Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

82-290

No.

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS,
Attorney General of the State of New York,

Appellees.

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

Counsel of Record:

DAVID A. ROSS
DECHERT PRICE & RHOADS
Eleven Broadway
New York, NY 10004
(212) 425-3510

Attorney for Appellant
The Equitable Life Assurance
Society of the United States

Of Counsel:

GALE G. MOSCOW
H. FRANCIS DELONE, JR.

August 20, 1982

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

The underlying issue in this appeal is whether a State constitutionally may enact a statute (1) the effect of which is to insulate from challenge unauthorized inequality in real property assessment practices ("inequality of assessment"), by precluding the only viable—and most probative—proof of such inequality, and (2) the result of which is to deny taxpayers the right to Equal Protection and Due Process of law. The State of New York, on December 3, 1981, enacted precisely such a statute, Act of December 3, 1981, ch. 1057, § 7, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp. 1 at 1981-233) ("L. 1981, ch. 1057, § 7"). This case challenges the constitutionality of that statute.

QUESTION PRESENTED

Whether the New York State statute, L. 1981, ch. 1057, § 7, which effectively denies to a taxpayer in New York City the right to prove inequality of assessment with respect to real property taxes levied prior to the enactment of the statute, denies that taxpayer the Equal Protection or Due Process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

LIST OF PARTIES

The parties in the Court of Appeals of New York are set forth in the caption of the case in this Court.[1]

---

1. The Court of Appeals of New York held joint oral argument and issued a joint opinion in this case and the case of *Colt Industries, Inc. v. Finance Administrator of the City of New York*, 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982). The joint opinion, however, contained separate orders. Moreover, these two cases were not consolidated below and were separately briefed in the Court of Appeals.

The Appellant has notified the Clerk of this Court that it does not consider Colt Industries a party to the proceeding in the Court from whose judgment this appeal is being taken, and has served Colt Industries with a copy of this notice. Should this Court conclude that Colt Industries was a party to that proceeding within the meaning of Rules 10 and 15 of the United States Supreme Court Rules, Colt Industries should be deemed a party with no interest in the outcome of this appeal which has received proper notice in accordance with Rule 10.4 of the United States Supreme Court Rules.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
How the Federal Question Was Presented	7
The Question Is Substantial	10
A. Due Process Issue Presented by this Appeal	15
B. Equal Protection Issue Presented by this Appeal	16
Conclusion	21

Appendix:

Court of Appeals, State of New York, Opinion and Order, Entered January 7, 1982	A1
Supreme Court of the State of New York, Appellate Division: First Department, Opinion and Order, Entered May 12, 1982	A10
Supreme Court of the State of New York, County of New York, Transcript of August 7, 1980 Hearing on Motions, Containing Verbal Order Denying Motions	A12
Supreme Court of the State of New York, County of New York, Order and Memorandum Opinion (*Colt Industries*), Entered June 12, 1980	A20
Court of Appeals, State of New York, Order Denying Motion for Reargument, Entered March 23, 1982	A32
Court of Appeals, State of New York, Decree Appealed From, Entered January 7, 1982	A33
Court of Appeals, State of New York, Notice of Appeal	A34

TABLE OF CONTENTS (Continued)

Page

Supreme Court of the United States, Order Extending Time for Docketing Appeal A36

Petitioner's Affidavit in Support of Motion, Block 1374, Lot 49 S.E. ("Greenfeld Affidavit I") A37

Petitioner's Affidavit in Support of Motion, Block 1291, Lot 69 ("Greenfeld Affidavit II") A42

Petitioner's Affidavit in Support of Motions ("Haims Affidavit") A47

Decision of the Appellate Division in *Matter of Colt Industries, Inc.* (a companion case) A50

Opinion of Judge Farley (Sup. Ct. Nassau Co.) in *Canigiani v. Board of Assessors*, Slip Opinion A58

Statutes A70

Administrative Code of the City of New York, Vol. 2, ch. 7, Title A, 166-1.0 ..... A70

Act of December 3, 1981, ch. 1057, §§ 305(2), 706, 707, 1801(a), McKinney's 1981 New York Session Laws (Mar. 1982 Supp., at 1981-219, 232, 233) A70

TABLE OF AUTHORITIES

Cases Cited: **Page**

Canigiani v. Board of Assessors, N. Y. L. J., July 9, 1981, at 13, col. 2 (Sup. Ct. Nassau Co., June 29, 1981) 13

Colt Industries, Inc. v. Finance Administrator, 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982) ..... ii, 1

Colt Industries, Inc. v. Finance Administrator, 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981) 1

Colt Industries, Inc. v. Finance Administrator, N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980) 1, 14, 15

Cox Broadcasting Corp. v. Cohn, 420 U. S. 469 (1975) 1, 20

Davis v. Wechsler, 263 U. S. 22 (1923) 19

Ed Guth Realty, Inc. v. Gingold, 34 N. Y. 2d 440, 358 N. Y. S. 2d 367 (1974) 5, 6, 13, 14, 15

860 Executive Towers, Inc. v. Board of Assessors, 53 A. D. 2d 463, 385 N. Y. S. 2d 604 (2d Dept. 1976), *aff'd sub nom.* Pierre Pellaton Apartments, Inc. v. Board of Assessors of County of Nassau, *on opinion below*, 43 N. Y. 2d 769, 401 N. Y. S. 2d 1013 (1977) 12, 13

Gibbes v. Zimmerman, 290 U. S. 326 (1933) 16

Helierstein v. Assessor of Town of Islip, 37 N. Y. 2d 1, 371 N. Y. S. 2d 388 (1975) 4, 10, 11

Hillsborough Township v. Cromwell, 326 U. S. 620 (1946) .. 19

J. A. Green Construction Corp. v. Finance Administrator, 56 N. Y. 2d 369 (1982) 15, 17, 18

Missouri v. Lewis, 101 U. S. 22 (1879) 16, 17, 18

People ex rel. Parklin Operating Corp. v. Miller, 287 N. Y. 126 (1941) 4, 10, 11

Pope v. Atlantic C. L. R. Co., 345 U. S. 379 (1953) 1, 20

Pritchard v. Norton, 106 U. S. 124 (1882) 15

Salsburg v. Maryland, 346 U. S. 545 (1954) 16, 17, 18

TABLE OF AUTHORITIES (Continued)

Cases Cited (Continued): Page

Slewett & Farber v. Board of Assessors, 78 A. D. 2d 403, 435 N. Y. S. 2d 313 (2d Dept. 1981), *aff'd in part, modified in part, upon reargument*, 80 A. D. 2d 186, 438 N. Y. S. 2d 544, *modified*, 54 N. Y. 2d 547, 446 N. Y. S. 2d 241 (1982) 12, 13
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 (1923) 19
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 (1918) 17, 18, 19
Ward v. Love County, 253 U. S. 17 (1920) 19

Constitutional Provisions Cited:

United States Constitution Amendment XIV, § 1 ..... *passim*

Statutes Cited:

Act of December 3, 1981, ch. 1057, §§ 7, 305(2), 706, 707, 1801(a), McKinney's 1981 New York Session Laws (Mar. 1982 Supp., at 1981-219, 232, 233) ..... *passim*
Act of January 29, 1981, ch. 3, § 1, McKinney's 1981 New York Session Laws 4 ..... 5, 7
Act of May 15, 1981, ch. 107, § 1, McKinney's 1981 New York Session Laws 220 ..... 5, 7
Act of June 16, 1981, ch. 259, § 1, McKinney's 1981 New York Session Laws 441 ..... 5, 7
Act of May 22, 1979, ch. 126, § 2, McKinney's 1979 New York Session Laws 351 ..... 5, 6, 7
Act of April 27, 1969, ch. 302, McKinney's 1969 New York Session Laws 399 7
N. Y. Real Property Tax Law, § 307 (McKinney Cum. Supp., 1981-82) 4, 5
N. Y. Real Property Tax Law, § 720 (McKinney Cum. Supp., 1981-82) 6, 7, 8, 12
N. Y. Real Property Tax Law, § 1200 (McKinney 1972) 5

TABLE OF AUTHORITIES (Continued)

Statutes Cited (Continued): Page

Administrative Code of the City of New York, Vol. 2A, ch. 17, Title E, § E 17-8.0 4

Administrative Code of the City of New York, Vol. 2, ch. 7, Title A, § 166-1.0(b) 10

28 U. S. C. § 1257(2) 1

Miscellaneous:

New York State Legislative Annual—1981 4

Study for City Calls Realty Tax Hideously Inequitable, N .Y. Times, Apr. 24, 1981, § 1, at 1, col. 2 16

OPINIONS BELOW

The opinion of the Court of Appeals of New York (App., *infra*, A1-A9) is reported at 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982). The memorandum opinion of the Appellate Division of the Supreme Court of New York, First Judicial Department (App., *infra*, A10-A11) is reported at 81 A. D. 2d 781, 441 N. Y. S. 2d 385 (1st Dept. 1981).[2] The unreported verbal opinion of the Supreme Court of New York, rendered on August 7, 1980 (order entered on August 12, 1980), is reprinted in the Appendix attached hereto (App., *infra*, A12-A19).

The verbal opinion of the Supreme Court of New York incorporated by specific reference its prior unreported written opinion in *Colt Industries, Inc. v. Finance Administrator of the City of New York*, N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980). This written opinion is reproduced in the Appendix hereto (App., *infra*, A20-A31).

JURISDICTION

The order of the Court of Appeals of New York was entered on January 7, 1982. The Court of Appeals, on March 23, 1982, denied the motion for reargument made by the Equitable Life Assurance Society of the United States on February 6, 1982. A notice of appeal to this Court was filed in the Court of Appeals on March 29, 1982. On June 16, 1982, Justice Marshall extended the time for docketing the appeal to and including August 20, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2). *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 479, 481 (1975); *Pope v. Atlantic C. L. R. Co.*, 345 U. S. 379, 381-83 (1953).

---

2. The dissenting opinion in the Appellate Division of the Supreme Court of New York incorporates by specific reference the dissenting opinion in *Colt Industries, Inc. v. Finance Administrator of the City of New York* (App., *infra*, A50-A57), which is reported at 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions involved are the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent portion of the challenged State statute, L. 1981, ch. 1057, § 7, reads as follows:

> § 7. Subdivision three of Section seven hundred twenty of such law [New York Real Property Tax Law] is REPEALED and a new subdivision three is added to read as follows:
>
> 3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be.
>
> Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of

such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:

(a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;

(b) in all assessing units other than special assessing units as defined in section eighteen hundred one [App., *infra*, A72] of this chapter [assessing units with a population of over 1,000,000, *i.e.*, New York City and Nassau County], the state equalization rate established for the roll containing the assessment under review; or

(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio.

STATEMENT OF THE CASE

As set out in the introductory paragraph, the underlying issue in this appeal is whether a State constitutionally may enact a statute the effect of which is to insulate from challenge unauthorized inequality in real property assessment practices, by precluding the only viable—and most probative—proof of such inequality, and the result of which is to deny taxpayers the right to Equal Protection and Due Process of law.

On December 3, 1981, the Legislature of the State of New York ("State") enacted a comprehensive real property assessment scheme, Act of December 3, 1981, ch. 1057, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp., at 1981-219, *et seq.*) designed to overrule the decision of the Court of Appeals of New York in *Hellerstein v. Assessor of Town of Islip*, 37 N. Y. 2d 1, 371 N. Y. S. 2d 388 (1975), which required full value assessment for all properties.[3] This legislative enactment provides that all real property be assessed at a uniform percentage of value (fractional assessment). *Id.*, § 305(2) (App., *infra*, A70). At all times pertinent hereto, the City of New York, pursuant to Chapter 7, Title E, § E17-8.0 of the Administrative Code of the City of New York, was required to assess real property at uniform full value, *see People ex rel. Parklin Operating Corp. v. Miller*, 287 N. Y. 126, 128-29 (1941); the City did not have an authorized classification system of assessment.[4]

---

3. L. 1981, ch. 1057 was enacted over the veto of Governor Hugh Carey. The Governor's Veto Memorandum found that the provisions of the bill "do not meet the standards of fairness to which our taxpayers are entitled." *New York State Legislative Annual—1981*, at page 622.

4. The City has contended that pursuant § 307(3) of the Real Property Tax Law of New York, enacted in 1978 (expired on October 30, 1981), it was excused from complying with the full value assessment mandate of its Administrative Code. In any

The actual ratio of assessed value-to-full market value, utilized by New York City in its real property assessment system for the period pertinent hereto, is available from a single source: the State Board of Equalization and Assessment ("SBEA"), a permanent State agency created in 1960. Pursuant to § 1200 of the Real Property Tax Law of New York ("RPTL"), the SBEA is required to compile the aggregate ratio of assessed value-to-fair market value ("State Equalization Rate") for property within each assessing unit within the State. Utilization of the State Equalization Rate, therefore, readily exposes inequality of assessment of a particular property *vis-à-vis* all other properties within the assessing unit.

In a series of enactments, commencing in 1979, the State Legislature precluded use of the State Equalization Rate in real estate tax proceedings. Act of May 22, 1979, ch. 126, § 2, McKinney's 1979 N. Y. Session Laws 351; Act of January 29, 1981, ch. 3, § 1, McKinney's 1981 N. Y. Session Laws 4; Act of May 15, 1981, ch. 107, § 1, McKinney's 1981 N. Y. Session Laws 220; Act of June 16, 1981, ch. 259, § 1, McKinney's 1981 N. Y. Session Laws 441; L. 1981, ch. 1057, § 7 (preclusion in New York City and Nassau County only).

Prior to the legislative enactments precluding use of the State Equalization Rate in real estate tax proceedings, the Court of Appeals of New York expressly held the State Equalization Rate to be the most objective evidence of inequality: "Utilization of the equalization rate which is objectively arrived at, and which today is expertly arrived at, would tend to greatly simplify and narrow the [real estate tax] proceeding." *Ed Guth Realty, Inc. v. Gingold*, 34 N. Y. 2d 440, 449-50, 358 N. Y. S. 2d 372-73 (1974). The *Guth* Court concluded:

---

4. (Cont'd.)
event, RPTL § 307 did not authorize a classification scheme of assessment; nor did any Courts of the State during their review of this case accept the position asserted by the City.

"[W]hile the primary purpose of the State equalization rate may be to facilitate uniform State aid to localities, there is no discernible reason why it also may not be used in individual inequality cases." 34 N. Y. 2d at 451, 358 N. Y. S. 2d at 373.

Against this background, the Appellant, the Equitable Life Assurance Society of the United States ("Equitable"), commenced proceedings to review the tax assessments of its real property located at 717 Fifth Avenue, City and State of New York, for the tax years 1977-78 through 1979-80, inclusive. Similarly, proceedings challenging the tax assessments for the tax years 1972-73 through 1979-80, inclusive, of the real property located at 645 Madison Avenue, City and State of New York, were commenced by timely service and filing of petitions for the respective tax years. The petitions relative to each of these two properties alleged, *inter alia*, that the assessments were erroneous by reason of inequality in that they were made at a higher proportionate valuation than were the assessments of other property in New York City generally.

Pursuant to the rules of the Supreme Court of New York, Equitable timely advised the Court of its intent to proceed to trial of each matter on the claim of inequality. On July 28, 1980, Equitable, seeking to use the State Equalization Rate to establish the inequality of its real property assessments, moved to dismiss certain defenses to its inequality claims and for partial summary judgment.

Upon denial of its motions by the trial court, Equitable proceeded through the appellate process of the State, arguing that it had a Constitutional right to use the State Equalization Rate to establish the inequality of its assessments.[5]

---

5. The statute initially challenged by Equitable in the Supreme Court of New York was RPTL § 720(3) (Act of May 22, 1979, ch.

HOW THE FEDERAL QUESTION WAS PRESENTED

The federal question raised by Equitable at each judicial level of this case was whether the State, in precluding Equitable from using the State Equalization Rate to establish the inequality of its real property assessments, denied to Equitable its right to the Equal Protection and Due Process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The federal question was raised initially in the papers submitted in support of July 28, 1982 motions made before the Supreme Court of New York. Equitable asserted therein that the Act of May 22, 1979, ch. 126, § 2, 1979 McKinney's N. Y. Session Laws 351 ("RPTL § 720(3)") (a predecessor of L. 1981, ch. 1057, § 7) need not be read in a fashion so as to preclude use of the State Equalization Rate and that if so read the statute violated the right of Equitable to the Equal Protection and Due Process of law guaranteed by the Fourteenth Amendment

5. (Cont'd.)

126, § 2, McKinney's 1979 N. Y. Session Laws 351. This statute amended the Act of April 27, 1969, ch. 302, § 2, McKinney's 1969 N. Y. Session Laws 399, which had permitted a taxpayer to rely solely upon the State Equalization Rate for proceedings commenced after April 27, 1969. The 1979 amendment eliminated all reference to use of the State Equalization Rate and was declared applicable to any proceeding commenced after January 1, 1970 and not finally determined as of May 22, 1979. By its terms, the 1979 amendment was to expire on December 31, 1980. The terms of the amendment, however, were extended repeatedly by the Legislature. Act of January 29, 1981, ch. 3, § 1, McKinney's 1981 N. Y. Session Laws 4; Act of May 15, 1981, ch. 107, § 1, McKinney's N. Y. Session Laws 220; Act of June 16, 1981, ch. 259, § 1, McKinney's 1981 N. Y. Session Laws 441. On October 30, 1981, L. 1981, ch. 259, § 1, expired. On December 3, 1982, RPTL § 720(3) was repealed and the statute challenged herein, L. 1981, ch. 1057, § 7, was enacted.

of the Constitution of the United States. The trial court rejected these positions, denied Equitable the relief sought and, on August 12, 1980, entered an order to that effect.

Equitable appealed the order of the Supreme Court of New York to the Appellate Division, First Judicial Department, of that Court on September 10, 1980. Equitable continued its challenge of the constitutionality of RPTL § 720(3), as amended, and again asserted its right to Equal Protection and Due Process of law. On December 11, 1980, the Appellate Division granted the motion of Robert Abrams, Attorney General for the State of New York, to intervene in the appeal.[6] The Appellate Division, on May 14, 1981, affirmed the order of the trial court on the verbal opinion of that court. Presiding Judge Murphy dissented, determining RPTL § 720(3) to be unconstitutional insofar as it operated retroactively against pending petitions for tax periods prior to May 22, 1979. On June 9, 1981, the Court granted, as a matter of law, the motion of Equitable for leave to appeal its decision to the Court of Appeals of New York.

The Equal Protection and Due Process arguments, made to the two lower courts, were presented to the Court of Appeals of New York. Subsequent to briefing and oral argument before the Court of Appeals, the Legislature repealed the challenged statute, RPTL § 720(3), and enacted L. 1981, ch. 1057, § 7. Upon the December 3, 1981 enactment of the statute herein challenged, the Court of Appeals requested supplemental briefs by the parties to the appeal regarding the newly-enacted statute. Equitable made two arguments. First, it urged that L. 1981, ch. 1057, § 7, which precludes use of the State Equalization Rate in New York City and Nassau County, was not applicable retroactively to the proceedings at

6. Mr. Abrams sought permission to intervene since the appeal challenged the constitutionality of a State statute.

issue in the appeal. Alternatively, Equitable demonstrated that even if the law were deemed retroactively applicable to assessment challenges commenced prior to its enactment, it was of no effect because it violated the right of Equitable to Equal Protection and Due Process of law in that it precluded use of the only viable—and most probative—method of establishing inequality of assessment.

The Court of Appeals, on January 7, 1982, modified the order of the Appellate Division of the Supreme Court, First Department, in ways not directly relevant to this appeal, and, as so modified, affirmed it. In so doing, the Court of Appeals held that L. 1981, ch. 1057, § 7 was retroactively applicable to the assessment challenges of Equitable and specifically further held that the statute did not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States. From this portion of the decision of the Court of Appeals, Equitable took this appeal.

THE QUESTION IS SUBSTANTIAL

The question of the scope of protection of the Due Process and Equal Protection Clauses of the Fourteenth Amendment against arbitrary and confiscatory real property taxation is substantial. The issue regarding this protection, presented in this case, is a novel one which falls in the interstices of prior decisions by this Court on the subject. In order to aid the Court in understanding the issue involved in this case and its novelty, a summary of the important provisions and recent developments in the State property tax law follows.

In New York City and the rest of the State, challenges to tax assessments may be predicated on one or more of three grounds: (1) overvaluation, (2) illegality, and (3) inequality. *See* Act of December 3, 1981, ch. 1057, §§ 706, 707, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp., at 1981-232-33) (App., *infra*, A71-A72); Administrative Code of the City of New York, Vol. 2 ch. 7, Title A, § 166-1.0(b) (App., *infra*, A70). As a practical matter, the grounds of overvaluation and illegality are illusory means of redressing confiscatory and arbitrary tax assessments.

Overvaluation is a non-viable basis for relief from excessive taxation because the prevalent practice of assessing jurisdictions within the State has been to assess real property at differing fractions of the legally mandated full value rate of assessment, which was required at all times pertinent hereto. *See Hellerstein v. Assessor of the Town of Islip, supra* 37 N. Y. 2d at 13, 371 N. Y. S. 2d at 398. This practice has resulted in two different assessment standards being applied by the taxing authorities and the courts: a full value standard of assessment has been applied by the courts in ruling on tax assessment challenges, while some fraction of that standard has been used by the taxing authorities. *Id.; People ex rel. Parklin*

Operating Corp. v. Miller, supra, 287 N. Y. at 128-29. Thus, overvaluation is an illusory remedy for assessment review inasmuch as the challenging taxpayer, by proceeding with such a challenge, will have conceded the assessment ratio to be 100% of full value, which it is not.

Hellerstein v. Assessor of the Town of Islip, supra, also demonstrates the illusory nature of an illegality challenge, a seldom used basis for tax assessment relief. In *Hellerstein,* the taxpayer argued that the entire roll for the town of Islip was void by reason of illegality in that her property and all other property in the town had been assessed at less than its full value. 37 N. Y. 2d at 3, 371 N. Y. S. 2d at 389. Although the New York Court of Appeals agreed that the assessments in Islip were illegal because they were made at less than full value, it concluded that it would be inappropriate for it to disturb the assessment roll of the town and, therefore, denied the taxpayer any relief as to past erroneous assessments. 37 N. Y. 2d at 14, 371 N. Y. S. 2d at 399.

The final ground for challenging the validity of real property tax assessments is inequality. Pursuant to the provisions of newly-enacted L. 1981, ch. 1057, § 7, inequality of an individual assessment may be established throughout the State by either, or both, of two methods: (1) the ratio of assessed value-to-full market value, as determined by appraisals of selected properties within the assessing unit ("selected parcels method"), or (2) the ratio of assessed value-to-full market value, as determined by sales with the assessing unit ("sales method"). Taxpayers in all assessing units within the State, except New York City and Nassau County, additionally are permitted by L. 1981, ch. 1057, § 7 to establish inequality of assessment by utilizing the State Equalization Rate.

As a practical matter, neither the selected parcels method nor the sales method—the only two methods

statutorily permitted in Nassau County and New York City—is a viable means of proving inequality of assessment within these two assessing units because of prohibitive costs and the excessive expenditure of time thereby required. In *860 Executive Towers, Inc. v. Board of Assessors of County of Nassau*, 53 A. D. 2d 463, 385 N. Y. S. 2d 604 (2d Dept. 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors of County of Nassau, on opinion below*, 43 N. Y. 2d 769, 401 N. Y. S. 2d 1013 (1977), the Court of Appeals of New York determined that a taxpayer cannot be relegated "to the time-consuming and expensive selected-parcel method of proving ratio, which has heretofore served to limit the number of certiorari proceedings and the amount of relief secured." 53 A. D. 2d at 471, 385 N. Y. S. 2d at 610.

The plurality of the Appellate Division of the Supreme Court in *Slewett & Farber v. Board of Assessors of the County of Nassau*, 78 A. D. 2d 403, 435 N. Y. S. 2d 313 (2d Dept. 1981), *aff'd in part, modified in part, upon reargument*, 80 A. D. 2d 186, 438 N. Y. S. 2d 544, *modified*, 54 N. Y. 2d 547, 446 N. Y. S. 2d 241 (1982), reviewed the costs incurred in using the selected parcels method in the *860 Executive Towers v. Board of Assessors of County of Nassau* case, *supra*, and found that the record therein indicated that: (1) legal research and preparation totalled 2,000 hours; (2) the trial extended over 50 full or partial days, as reflected by the trial transcript of approximately 7,000 pages; and (3) the total cost attributable to the selected parcels approach amounted to $484,000. 80 A. D. 2d at 215, 438 N. Y. S. 2d at 565. Upon review of the foregoing facts, the plurality concluded: "But if parcel selection seems an unconstitutionally expensive method by which to prove inequality, it is not the exclusive method, for the challenged statute [RPTL § 720(3), as then amended, now repealed] also permits proof of actual sales." *Id.*

The sales method is not viable by reason of essentially the same defects. Two months after the decision of the Appellate Division in *Slewett & Farber v. Board of Assessors of the County of Nassau,* the trial court in *Canigiani v. Board of Assessors of Nassau County,* N. Y. L. J., July 9, 1981, at 13, col. 2 (Sup. Ct. Nassau Co., June 29, 1981) (App., *infra* A58-A69), examined at length the viability of the sales method of establishing inequality. The Court found that the cost of establishing inequality, utilizing the sales approach, ranged from a low of $301,000 to a high of $644,000 for each of the seven tax years at issue therein. *Id.* The total expense of such an approach for the seven years at issue in the proceeding amounted to $2,000,000 to $4,500,000. *Id.* In contrast, the potential recovery per year for the one-story property owned by Mr. Canigiani was no more than $10,000, or a total potential recovery for the seven years at issue of less than $70,000. *Id.* In light of these facts, the Court concluded that the cost of establishing the aggregate ratio of assessed values to total full values by use of the sales method is "highly exorbitant and prohibitive" and thus, like the sample parcels method, the sales method of establishing inequality has no viability. *Id. See also Ed Guth Realty, Inc. v. Gingold, supra,* 34 N. Y. 2d at 449, 358 N. Y. S. 2d at 372.

The costs of establishing inequality of assessment in New York City by either the sales method or selected parcels method are significantly greater than those costs incurred in *860 Executive Towers, Inc. v. Board of Assessors of County of Nassau, supra,* and those costs anticipated in *Canigiani v. Board of Assessors of Nassau County, supra.* As set forth in the affidavit of Jerome Haims, M. A. I., annexed hereto (App., *infra,* A47-A49), the cost of the sales method in this case would be approximately $2,500,000; the cost of appraisals of comparable, selected parcels would be approximately $500,000 to $640,000.

Additionally, it would take approximately one year to compile the sales data and approximately twenty-two months to appraise comparable parcels. *Id.* Moreover, the estimates of Mr. Haims are particularly low, inasmuch as they were prepared on a section basis of comparison, as improperly required by the trial court, and not on the City wide basis, as permitted by the Court of Appeals of New York in this matter.

Thus, except in the most extreme cases, aggrieved taxpayers who must rely on one of these two methods of establishing inequality are precluded from obtaining judicial relief because the cost of proving inequality of assessment exceeds the tax refund to which the taxpayer would be entitled.[7] The challenged statute thus effectively precludes New York City and Nassau County taxpayers from challenging confiscatory taxation by limiting these taxpayers to two illusory methods of proving inequality of assessment.

The chilling effect of limiting New York City taxpayers to the selected parcels and sales methods of establishing inequality of assessment is evidenced by the fact that there have been no real estate tax inequality proceedings within New York City for approximately eighty years. *See Colt Industries v. Finance Administrator of the City*

7. Both the selected parcels and sales methods of proof have other drawbacks. When the selected parcels method is used, each side submits evidence of parcels with extreme ratios of assessed value-to-full value in support of its position. Thus, the court is presented with widely disparate and contradictory evidence of the actual ratio of assessed value-to-market value within a taxing district. *See Ed Guth Realty, Inc. v. Gingold, supra,* 34 N. Y. 2d at 449-50, 358 N. Y. S. 2d at 372-73. The additional drawbacks of the actual sales method arise from the difficulty of ascertaining the full consideration given to purchase property. Not every reported sale is at arms' length and the consideration reflected in deeds and tax stamps is often less than the full consideration given.

of New York, supra (App., *infra*, at A20-A21).

The State Equalization Rate is the only viable means of establishing inequality of assessment. Yet its use is precluded in New York City and Nassau County tax proceedings by L. 1981, ch. 1057, § 7. This Rate, officially propounded by a State agency, is readily available at minimal expense to aggrieved taxpayers asserting inequality of assessment claims.[8] Moreover, the State Equalization Rate has previously been determined by the highest Court of the State to be "objectively arrived at" and "expertly arrived at" and, as such, to be relevant and competent evidence in real estate tax proceedings. *Ed Guth Realty Inc. v. Gingold, supra*, 314 N. Y. 2d at 449-50, 358 N. Y. S. 2d at 372-73. *See also, J. A. Green Construction Corp. v. Finance Administrator and Tax Commission of the City of New York*, 56 N. Y. 2d 369 (1982).

A. Due Process Issue Presented by This Appeal

"No state shall . . . deprive any person of . . . property without due process of the law. . . ." § 1, XIV Amend., U. S. Const. From the language quoted from the Fourteenth Amendment, it is evident that a State may not deprive a taxpayer of property by imposing excessive taxes on his property without affording him a legal remedy to correct such arbitrary and confiscatory taxation.

Similarly, "[A]lthough a vested cause of action is property and is protected from arbitrary interference (*Pritchard v. Norton*, 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; *all that he is guaranteed by the*

8. In addition to its use in tax proceedings outside the City and Nassau County, the State Equalization Rate is used to determine the amount of State aid to which political subdivisions within the State are entitled.

Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." Gibbes v. Zimmerman, 290 U. S. 326, 332 (1933) (emphasis added).

The Due Process issue presented in this appeal is: What is the "effective procedure" guaranteed by the Fourteenth Amendment? While, as stated by this Court in *Gibbes*, the Fourteenth Amendment does not guarantee any particular form of remedy, it cannot be said that the State statute challenged herein which cosmetically provides illusory remedies, thereby provides Equitable the "effective procedure" guaranteed by the Fourteenth Amendment to assert its right to redress confiscatory real property taxation.[9]

B. Equal Protection Issue Presented by This Appeal

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." § 1, XIV Amend., U. S. Const.

The challenged State statute, L. 1981, ch. 1057, § 7, which presently permits the use of the State Equalization Rate in all assessing units of the State except New York City and Nassau County, a distinction based on the size of the population in each of these areas, unconstitutionally distinguishes between assessing units within the State. Nonetheless, the Court of Appeals of New York, relying primarily on the decisions of this Court in *Missouri v. Lewis*, 101 U. S. 22 (1879) and *Salsburg v. Maryland*, 346 U. S. 545 (1954), concluded that the size of population distinction in this statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

---

9. See *Study for City Calls Realty Tax Hideously Inequitable*, N. Y. Times, Apr. 24, 1981, § 1, at 1, col. 2.

The Court of Appeals, however, in relying on these cases, failed to consider the restrictions placed on the Constitutional validity of territorial distinctions by this Court in *Lewis* and *Salsburg*. As this Court noted in *Lewis*, a State may make laws which distinguish between territories within the State only "provided it does not deprive any person the equal protection of the laws, including the *equal right to resort to appropriate courts for redress.*" 101 U. S. at 30 (emphasis added). Similarly, in *Salsburg*, this Court stated: "The cumbersomeness of such centrally enacted legislation [regarding evidentiary rules in certain criminal prosecutions] as compared with the variations which may result from home rule is a matter for legislative discretion, not judicial supervision, *except where there is a clear conflict with constitutional limitations.*" 346 U. S. at 552-53 (emphasis added).

The size of population distinction upheld by the Court of Appeals in concluding that the Legislature could distinguish between New York City and Nassau County on the one hand, and the rest of the State on the other, contravenes the restrictions placed on territorial distinctions in *Lewis* and *Salsburg*.

As previously set forth, the size of population distinction (later described by the Court of Appeals of New York, in *J. A. Green Construction Corp. v. Finance Administrator and the Tax Commission of the City of New York, supra*, 56 N. Y. 2d at 376-77, as an economic distinction) sanctioned by the Court of Appeals in this case denies Equitable its right to Due Process of the law. Further, this size of population, or economic, distinction denies Equitable its right to Equal Protection of the laws in that it denies to it and other taxpayers in New York City and Nassau County an effective means of redressing intentionally arbitrary and discriminatory tax assessments. *See Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352-53

(1918). Additionally, the size of population, or economic, distinction drawn by L. 1981, ch. 1057, § 7 denies to Equitable "the equal right to resort to the appropriate courts for redress."

Moreover, the distinctions in the challenged statute have been recognized by the Court of Appeals of New York to be more than the simply procedural distinctions reviewed by this Court in *Salsburg* and *Lewis*. In *J. A. Green Construction Corp. v. Finance Administrator and the Tax Commission of the City of New York, supra*, 56 N. Y. 2d at 376, the Court of Appeals permitted use of the State Equalization Rate, a right it previously denied to Equitable. The Court held:

> "Though the kind of proof admissible to establish value is normally a procedural question to be determined by the law in effect at the time of trial [citations omitted], we think the history of legislation on this issue [footnote omitted] and the differention by the Legislature between New York City and Nassau on the one hand and the rest of the State on the other, based as it is upon the *economic*[10] effect of the differentiation, so imbues this normally procedural issue with substantive effect that we should not apply the usual rule." 56 N. Y. 2d at 376-77 (emphasis in original).[11]

---

10. As detailed in the introductory portion of this section, the cost of proof of inequality of assessment in these two areas by the selected parcels and sales methods is so great that it effectively precludes challenges to unequal assessments made in these areas.

11. The Court of Appeals permitted use of the State Equalization Rate in the *Green* case because the predecessor to L. 1981, ch. 1057, § 7 (in effect at the time at trial) had expired and the new statute was not enacted at the time the taxpayer in *Green* used the Rate.

Finally, that the Constitutional right of equality of assessment, in the absence of a valid classification system of assessment, cannot be eradicated directly or retroactively is axiomatic. *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623 (1946); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446 (1923); *Sunday Lake Iron Co. v. Wakefield, supra*, 247 U. S. at 352-53. It is just as incontrovertible that a State cannot impinge upon this right indirectly by declaring the only viable evidence of violations of this right to be inadmissible, so that taxpayers effectively cannot challenge unconstitutional discriminatory practices of the assessing authority.

The words of Justice Holmes in *Davis v. Wechsler*, 263 U. S. 22, 24 (1923) are particularly apposite here:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal rights. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22, 40 Sup. Ct. 419, 64 L. Ed. 751. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds [citation omitted]. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way [citation omitted]."

The decision of the Court of Appeals in this case is final; Equitable is precluded from using the State Equalization Rate to establish violation of its right to uniformity of assessment. For all intents and purposes, the federal issue presented herein is conclusive of the outcome of the case. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U. S. at 479; *Pope v. Atlantic C. L. R. Co., supra,* 345 U. S. at 381-83. Further review of this substantial federal issue cannot be had. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U. S. at 481.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DAVID A. ROSS
Member of the Bar of the
United States Supreme Court
DECHERT PRICE & RHOADS
Eleven Broadway
New York, NY 10004
Counsel of Record for Appellant
The Equitable Life Assurance
Society of the United States

Of Counsel:
GALE G. MOSCOW
H. FRANCIS DELONE, JR.

DATED: August 20, 1982

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 642

OPINION AND ORDER, ENTERED JANUARY 7, 1982

PER CURIAM.

In *Matter of Colt Inds. v. Finance Administrator of City of N. Y.*, the order of the Appellate Division, 439 N.Y.S.2d 24, should be modified by deleting therefrom all declarations as to the constitutionality or applicability of former section 307 and subdivision 3 of section 720 of the Real Property Tax Law and by reversing so much of the order as denied petitioner's motion for discovery of "special

sales data listings" and remitting that motion to Supreme Court for further consideration and disposition in light of our decision in this case. As so modified, the order of the Appellate Division, should be affirmed and the consolidated proceedings remitted to Supreme Court. The question certified is answered in the negative.

In *Matter of Equitable Life Assur. Soc. of U. S. v. Finance Administrator of City of N. Y.*, the order of the Appellate Division, 441 N.Y.S.2d 385, should be modified to the extent of granting petitioner's motion to dismiss those defenses which rely on the New York City Administrative Code's purported authorization of a classified system of assessment. As so modified, the order of the Appellate Division should be affirmed. The question certified should be answered in the negative.

Section 166-1.0 of the Administrative Code of the City of New York governs the procedure for review of tax assessments in the City of New York. By its terms, taxpayers may challenge the assessed valuation of their property on the grounds that it is illegal, that it overvalues the property, or that "the assessment is erroneous by reason of inequality." That section further provides that inequality may be proven by showing that the assessment was "made at a higher proportionate valuation than the assessment or other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year". To hold, as the courts below have, that this procedural provision is legislative authorization for a classified system of assessments in the City of New York improperly expands the scope of the section. In these proceedings to challenge tax assessments on the ground of inequality, we have no occasion to reach and, therefore, do not address the contentions of the parties with respect to the methods or systems of as-

sessments in New York City. Our attention is focused on assertions of inequality of actual assessments whatever the means or basis on which they were made. Thus, we hold that this section authorizes taxpayers who challenge the assessments of their real property to present proof of inequality based on either or both of two theories—that the particular assessment "has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section", or that the assessment "has been made at a higher proportionate valuation than the assessment of * * * other real property on the assessment rolls of the city for the same year." Thus, proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the city-wide assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof.

There remains the question whether, if it is sought to establish inequality with respect to city-wide assessment rolls, State equalization rates may be introduced. (Cf. *Matter of Rokowsky v. Finance Administrator of City of N. Y.*, 41 N.Y.2d 574, 394 N.Y.S.2d 176, 362 N.E.2d 974; *Guth Realty v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441.) Legislative action taken over the past few years to restrict the use of such proof and considered by the courts below [1] expired on October 30, 1981 and accordingly now has no application to this proceeding.

On December 3, 1981, however, the Legislature passed S-7000A over the Governor's veto (L.1981, ch. —). Section 7 of that bill contains a new subdivision 3 of

1. Amendment of subdivision 3 of section 720 of the Real Property Tax Law (L.1979, ch. 126, § 2; L.1981, ch. 3, § 1; L.1981, ch. 107, § 1; L.1981, ch. 259, § 1) and enactment of new section 721 of the Real Property Tax Law (L.1979, ch. 127, § 2; L.1981, ch. 3, § 2).

section 720.[2] This new legislation contains no express

2. The revised subdivision 3 of section 720 now reads:

"3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be. Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:

"(a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;

"(b) in all assessing units other than special assessing units as defined in section eighteen hundred one of this chapter, the state equalization rate established for the roll containing the assessment under review; or

"(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio."

provision for retroactive application as did the former law (L.1979, ch. 126, § 4; L.1979, ch. 127, § 3); it provides only, in section 17, that "this act shall take effect immediately". Accordingly to the extent that it is otherwise appropriate, it applies to proceedings pending on December 3, 1981.

We hold that this new subdivision 3 now applies to these proceedings. Although the proceedings were commenced prior to the enactment of S-7000A, no evidentiary hearings have yet been held or interlocutory determinations made as was the case in *Matter of Slewett & Farber v. Board of Assessors of County of Nassau*, 54 N.Y.2d 547, — N.Y.S.2d —, 430 N.E.2d 1294 [decided herewith]. Accordingly, when such evidentiary hearings are held in these cases on remittal following this appeal, among other considerations to be taken into account in rulings with respect to the admissibility of evidence will be the provisions of new subdivision 3 of section 720.

We further consider, on the basis of post-argument briefs submitted to this court after the enactment by the Legislature of S-7000A, the constitutionality of the new subdivision 3 of section 720 insofar as it is applicable to the litigation now before us. As did former subdivision 3, this section governs what evidence is admissible on the issue of whether an assessment is unequal. Data on selected parcels and actual sales are admissible as evidence to show an unequal assessment in all assessing units. Use of the State equalization rate, however, is limited to "all assessing units other than special assessing units."[3] The effect of this provision is to foreclose the use of State equalization rates in this type of proceeding in the City of New York and in Nassau County.

---

3. A special assessing unit is defined by section 1801 as an assessing unit with a population of one million or more.

Petitioners claim that this is a restriction based on population and geographic area which violates their right to equal protection of the laws. They further claim that the excessive cost of proving a claim of unequal assessment associated with the remaining two methods of proof essentially bars them from seeking any redress and, therefore, constitutes a violation of their due process rights. Recognizing that subdivision 3 of section 720 is procedural in nature, we hold this section of the Real Property Tax Law, as enacted on December 3, 1981, to be constitutional.

The core of petitioners' equal protection claim is that the Legislature, by allowing the use of State equalization rates as proof of the ratio between assessed and full value in all parts of the State but the City of New York and Nassau County, makes an impermissible distinction between geographic areas of the State. "Equal protection does not require territorial uniformity of law within a State (*Salsburg v. Maryland*, 346 U.S. 545, 74 S.Ct. 346, 98 L.Ed. 281 [rules of evidence in prosecutions for gambling offenses]; *Missouri v. Lewis*, 101 U.S. 22, 25 L.Ed. 989 [access to appellate courts])." (*Matter of Rosenthal v. Hartnett*, 36 N.Y.2d 269, 274, 367 N.Y.S.2d 247, 326 N.E.2d 811.) It has long been the rule that the State Legislatures may make such geographic distinctions without denying any person equal protection of the laws. The Supreme Court in *Missouri v. Lewis*, 101 U.S. 22, 31, 25 L.Ed. 989 stated: "If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amend-

ment, be a denial to any person of the equal protection of the laws."

The distinction made by this legislation, although not based on geographic factors, is neither impermissible nor unreasonable; rather, the distinction is based on size of population within municipal units.[4] To strike down this provision, it must be shown that the Legislature acted unreasonably—that is, that the Legislature did not have a rational basis for creating such a distinction.

The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property.

Petitioners further contend that by restricting the use of State equalization rates as proof of the ratio between assessed and full value in special assessing units, their right to due process of the law has been violated. This argument is premised on claims that the other authorized methods of proof, selected parcels and sales, are prohibitively expensive so that petitioners, and similarly situated parties, are effectively foreclosed from challenging the rate of assessment of their property. While a "law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law" (*Board of Comrs. of Excise of City of Auburn v. Merchant*, 103 N.Y.

4. The application of this distinction, as well as every differentiation among municipal units, whatever its basis, will have a geographic consequence.

143, 148, 8 N.E. 484), it cannot be said that this legislation has been shown, on its face, to constitute such a deprivation. The fact that these procedures are admittedly more cumbersome and expensive does not require a holding that there is a deprivation of due process. (*Gibbes v. Zimmerman*, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342.) The Legislature, in its wisdom, has seen fit to restrict the admissible proof to selected parcels and sales data and there are no grounds for this court, by judicial fiat, to authorize additional proof. The Legislature did no more than restore, in special assessing units, the *status quo ante* chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates.

Once the ratio between assessed value and full market value has been determined, petitioners will be required to establish the fair market value for the property against which the ratio will be applied to determine whether the assessment is proper. Because sales data of comparable property is one method of establishing a fair market value, petitioner Colt Industries' motion for discovery of that data is remitted to Supreme Court for further consideration and disposition in light of our decision in this case. Assuming petitioner can show a correlation between those listings and the question of fair market value, discovery should be granted.

COOKE, *C.J.*, and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, *JJ.*, concur in *Per Curiam* opinion.

In *Matter of Colt Inds. v. Finance Administrator*: Order modified, without costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

In *Matter of Equitable Life Assur. Soc. v. Finance Administrator*: Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX
COMMISSION OF THE CITY OF NEW YORK,
Respondents-Respondents,

ROBERT ABRAMS, Attorney General
of the State of New York,
Intervenor.

No. 10560-61

Index No. 56322/77
Block 1291, Lot 69

and

Index No. 56323/77
Block 1374, Lot 49 S.E.

**OPINION AND ORDER,
ENTERED MAY 12, 1981**

Supreme Court, Appellate Division, First Department. May 12, 1981. D. S. Greenfield, New York City, for appellant. L. Olarsch, New York City, for respondents-respondents. J. M. Farrar, New York City, for intervenor-respondent. Orders, Supreme Court, New York County (Mangan, J.), entered on August 12, 1980, affirmed on

the opinion of Mangan, J., at Special Term, without costs and without disbursements.

All concur, except Murphy, P. J. who dissents in part in a memorandum as follows:

I would grant Equitable's motions for summary relief only to the extent of declaring RPTL § 720(3) to be unconstitutional insofar as it is retroactively operative against pending petitions covering tax periods prior to May 22, 1979. (See partial dissent in *Colt Industries v. Finance Administrator*, 81 A.D.2d 777, 439 N.Y.S.2d 24.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX
COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE
Index No. 56322/77
Block 1291/Lot 69

**TRANSCRIPT OF AUGUST 7, 1980
HEARING ON MOTIONS, CONTAINING
VERBAL ORDER DENYING MOTIONS**

---

60 Centre Street
New York, New York
August 7, 1980

Before:

HONORABLE MARGARET M. J. MANGAN, Justice

Appearances:

MESSRS. MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Petitioners
430 Park Avenue
New York, New York 10022
By: DANIEL S. GREENFIELD, ESQ.,
ALLEN G. SCHWARTZ, ESQ.
Corporation Counsel, City of New York

By: MORTIMER TRAKTMAN, Assistant Corporation Counsel

THE COURT: All right, now we have five different motions?

MR. GREENFIELD: That's correct, your Honor.

THE COURT: Are you going to argue the whole five?

MR. GREENFIELD: Yes, your Honor. I am appearing for Equitable and I am appearing of counsel for Mr. Krieger on the United Nations.

THE COURT: The five motions are really similar so that the argument for one is applicable to all five?

MR. GREENFIELD: That's correct, your Honor. I am also appearing for 540 Madison Avenue Associates, so those are the five motions.

THE COURT: You may start the argument.

MR. GREENFIELD: Thank you, your Honor.

The motions that were brought on before your Honor this morning essentially seek a determination that petitioner in these five proceedings, which are scheduled to be tried on the basis of inequality, may use the State Equalization Rate for the purpose of establishing the ratio.

I'm not going, unless your Honor would like me to, into the substantive basis for the motion.

THE COURT: No, I have made a determination of law on the State Rate in the Colt Industries matter.

MR. GREENFIELD: I recognize that, your Honor, and I am not as I said going to repeat the argument which has been fully set forth in our papers. I'm not going to go over them again.

What I would like to address myself to, and we have submitted reply affidavits on this point—but I would like

to address myself rather more specifically to some of the points raised by Mr. Traktman in the opposition affidavit that he submitted on these motions.

Mr. Traktman states I believe that petitioners did not have the right to make these motions which he characterized as motions for reargument of the Colt decision, and he indicated the petitioners were without standing to make those motions.

The petitioners in the cases before your Honor this morning were not party to the Colt decision.

THE COURT: Well, that is one phase of his argument, since you are not part—since you weren't a party to it, you cannot come in on it.

MR. GREENFIELD: We are not coming in on Colt your Honor. We were certainly not parties to it, so we are not bound by that decision in so much as the order in Colt and the decision in Colt do not refer to us. We would not be, as far as I know, collaterally estopped or subject to the principles of res judicata, so that the only way the Colt decision would be applicable to us would be if an order were entered essentially holding the decision in Colt applicable to our case.

At the moment we find ourselves betwixt and between, since Mr. Traktman apparently would like us bound by the Colt decision, but we are not in a position where we can appeal it because no order has been entered in these cases, which would afford us the opportunity to appeal the matter.

Mr. Traktman also seems to imply there was something incorrect in our seeking this order, and that our motivation at least in part was somehow to obtain an appealable order. We certainly recognize at least the possibility that your Honor will adhere to her decision in Colt in connection with the decision on the substantive aspects of this motion.

But as I indicated, at the moment we are not bound by it. Your Honor is certainly not bound by your Honor's decision in Colt. If your Honor so chose, your Honor would be certainly free to enter a different order.

THE COURT: Well, I would sound like a very inconsistent Judge if I made a decision so far reaching as the decision in Colt, to change my position on another motion.

MR. GREENFIELD: I am only indicating—

THE COURT: I am bound by my own decision which I have every confidence is a right application of the law as it applies to New York City.

MR. GREENFIELD: The third point of Mr. Traktman's affidavit which I would like to address myself is his statement that the purpose of making these motions is to obtain a stay of proceeding. That is not the purpose of the motions.

The purpose of the motions is to hopefully obtain the relief we seek, although we recognize of course your Honor's decision in Colt. And if your Honor adheres to your Honor's decision in Colt, we would then appeal that as expeditiously as we possibly can and seek to obtain a determination of the Appellate Courts, either affirming or reversing your Honor's decision, so that we can get the measure of certainty to which the petitioners here feel they are entitled to have at as soon a date as possible.

Now in connection with that, should your Honor determine to deny the substantive aspects of this motion, we have requested a stay of all proceedings. We have requested it because we feel and believe it fundamentally unfair that we are forced to undergo the expense of even the over-valuation portion of the trial, which is quite expensive on properties in the magnitude with which we are involved here, before we know what we're going to have to establish in order to prove inequality.

For that reason, we strongly and respectfully urge that we be given the opportunity to go to the Appellate Division, if necessary the Court of Appeals, if necessary the Federal Courts, but to obtain a final definitive determination on these points before we have to advise our clients, before our clients have to reach a determination as to whether they are going to spend the money, even in the context of the over-valuation portion of the trial.

It is in that context that we have alternatively made our request for a stay.

THE COURT: Allright, Mr. Traktman, I'll hear you.

MR. TRAKTMAN: If your Honor pleases, I think Mr. Greenfield has outlined his papers quite well to you and possibly summarizes our position. If your Honor will recall, there was a multiple—

THE COURT: Fifty motions.

MR. TRAKTMAN: —a couple of weeks ago before you for a stay, at which time Mr. Kaufman, on behalf of the tax certiorari bar, most eloquently expressed the same sentiments and reasons for a stay.

Your Honor heard those motions, some 30 or 40 of them—

THE COURT: Fifty of them.

MR. TRAKTMAN: —and ruled that the stay would not issue. I fail to see any distinction between the five cases now before us and those. As Mr. Greenfield says, the bottom line of his argument was that they do want an opportunity to contest the Court's ruling in Colt, vis-a-vis the use of the State Equalization Rate, and as to whether or not 166-1.0 governs New York City proceedings.

In sum, that is the City's position. With regard to a stay, since we took no position at the prior motion, we adhere to that same position now.

THE COURT: All right, in passing I would like to comment on the innuendo in Paragraph 3 of Mr. Greenfield's affidavit, and elsewhere, in the papers he has prepared, it states that no formal notice of a trial set had been given to petitioner.

On July 15, 1980, on the day I heard some 50 odd motions seeking a stay of inequality trials, a representative of Marshall, Bratter, Greene, Allison, Tucker & Greenfield sat in this courtroom and was instructed by a member of my staff, at the conclusion of the Court's remarks, to obtain a copy of the reorganized Special 9 inequality calendar.

I would have had it that day, but the IBM machine was out of order. So I deferred it to the following day.

Just as calling a piece of granite a diamond does not alter its substance, nor preclude an inquiry into its essential nature, titling a motion as one for summary judgment does not necessarily make it so.

In the matter of Colt Industries, petitioner therein sought partial summary judgment with the intention of removing what he perceived as the barriers to proof of inequality by utilization of the S.B.E.A. rate. The first branch of the relief sought in the motions before me this morning boils down as a declaration by this Court that petitioners may prove inequality by using the S.B.E.A. rate.

At Paragraph 6 of the Greenfield affidavit, I quote the following: "It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that Colt was incorrectly was decided. We therefore urge that this Court reconsider its decision in Colt and grant the relief requested."

The "defenses" that petitioner seeks an order dismissing are not defenses that have been pled by the City. They are for the most part the essence of the Court's decision in Colt Industries. In fact, petitioners' motions seek

to reargue the decision of this Court in Colt Industries.

However, they have no standing to do so since none of the movants this morning were parties to the Colt matter. Accordingly, petitioner's motion for reargument of the decision in Colt Industries are respectively denied.

The alternative relief sought is a stay of trial pending an appeal from a denial of petitioner's motions. As I have indicated, these motions are for reargument, not for summary judgment, and a denial of a motion for reargument is not appealable.

Therefore, there is no basis to stay the trial of these matters pending an appeal from these motions.

The larger issue of a stay of inequality proceedings generally was addressed by this Court from the bench on July 15, 1980, and these remarks are incorporated herein.

Something of a new "wrinkle" is presented in movants' papers with the affidavit of Mr. Haims' estimating the cost of approving inequality. Mr. Haims' estimate for analyzing all the sales in Section 5 is inapplicable, since under Colt petitioner must prove that he has unequally assessed against the other real properties of like character.

Haims' estimate of an analysis of parcels and sales in Section 5 of like character is at maximum $850,000. This is, of course, an estimate.

Several facts will place it in prospective. There are some 1500 office buildings in Manhattan assessed at about $6.7 billion. At least $2.3 billion of this total is found in Section 5. Over the span of eight years, which is the basis of Haims' estimate, the assessments on Section 5 office buildings would total at least $16 billion.

The average assessment on a Manhattan office building for 1976-1977 is about $4.5 mil. Justice Schwartz and this Court have some 40 office buildings in Section 5 on our respective calendars. Using eight years as the basis of an estimate, the assessment that would be in review would be at least $1⅛ billion. A cost of $850,000 to analyze com-

parable parcels and sales in Section 5 begins to pale against such numbers.

In addition, I commend to petitioner's attention Real Property Tax Law 716 and its provisions for the amelioration of expenses of proving inequality.

Further, it is my intention, if petitioners wish and insofar as it is practicable—to hold a joint ratio trial of like kind office buildings in Section 5, which will afford an additional opportunity to avoid duplicate expenses and distribute the costs of moving inequality.

Where a common question has been raised, an opportunity to be heard is provided. I refer counsel to the cases of Schwartz against Public Administrator and Molloy against Trombly.

Let me make clear that this Court does not intend to force petitioners to do anything. You may rely on the S.B.E.A. rate and I will dismiss. For even if Section 166-1.0 of the Administrative Code is not as I read it, Real Property Tax Law 307 requires proof of inequality intraclass, and Real Property Tax Law 720, Subdivision 3, precludes the use of the S.P.E.A. rate.

At the point of such dismissal you will then have a clear issue to bring before the Appellate Division and therewill be no need to attach the appellation "summary judgment" to what is in fact a motion to reargue.

That is the decision of the Court. Have a happy vacation.

MR. GREENFIELD: I would like to ask only whether I can submit a simple order this afternoon for signature.

THE COURT: The motion to reargue is denied and I will submit an order to that effect.

MR. GREENFIELD: Thank you, your Honor.

THE COURT: Which, I might add, is not appealable.

(Whereupon the proceedings were concluded.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of The Application Of
COLT INDUSTRIES, INC.,

Petitioner,

—against—

THE TAX COMMISSION OF THE
CITY OF NEW YORK,

Respondent.

Index No.
Block 1291, Lot 38

ORDER AND MEMORANDUM OPINION, ENTERED JUNE 12, 1980

The proceeding underlying the motion is grounded in petitions filed by Colt Industries, Inc., alleging the tax assessments levied upon its eighteen-story modern office building located at 430 Park Avenue, New York County, Block 1291, Lot 38, for tax years 1969-70 through 1972-73 and 1974-75 through 1976-77 are erroneous by reasons of overvaluation and inequality in that the same are in excess of the full value of the said real property and in that said assessments are proportionately higher than similar property in the City of New York.

Petitioner seeks:

(1) an order consolidating the petitions filed;

(2) an order directing respondent to disclose to petitioner "special sales data listings" for 1969 through 1978;

(3) partial summary judgment declaring unconstitutional what petitioner perceives as the statutory impediments to proof of inequality, sections 307 (L. 1978,

ch. 476, sec. 1) and 720(3) (L. 1979, ch. 126, sec. 2) of the Real Property Tax Law (RPTL).

Petitioner intends to prove the allegation of inequality by utilizing the citywide equalization rate established by the State Board of Equalization and Assessment (SBEA). RPTL, section 307 sets the standard of assessment in certain assessing units and defines an inequality pleading. The progenitor of RPTL, section 307 is RPTL, section 706 (L. 1977, ch. 438, sec. 1; L. 1958, ch. 959, Tax Law sec. 290-c, formerly sec. 290 added L. 1909, ch. 62, L. 1896, ch. 908, L. 1880, ch. 296) which, as it relates to inequality, requires a pleading:

> • • • if unequal • • • that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll. • • •

Thus, the standard established measures inequality against all property upon the tax roll (whole-roll inequality). RPTL, section 307, which petitioner challenges herein, redefines by narrowing the scope of an inequality pleading by requiring that petitoner allege intra-class inequality:

> • • • that the assessment has been made at a higher proportionate valuation than the assessment of other taxable real property of the *same major type* as determined by the State Board of Equalization and Assessment • • • (emphasis added).

In the City of New York, an inequality pleading is governed and the standard of assessment is set[1] by the Administrative Code of the City of New York, section 166-1.0(b):

> Such (judicial) review shall be allowed only on one or more of the following grounds . . . : • • • the assess-

1. In averring that sec. 307 impermissibly delegates taxing authority, petitioner acknowledges that the pleading section defines the authority of the assessor.

ment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the *assessment of other real property of like character* in the same ward of section, or other real property on the assessment rolls of the City for the same year, specifying the instances in which such inequality exists and the extent thereof * * * (emphasis added).

For well over a century, the State Legislature has recognized by special legislation applicable only to the City of New York, the need for a dichotomy between the State and the City of New York in the levy and review of assessments. The present system of assessment in the City of New York has its origin in L. 1857, ch. 677, sec. 24, which provides for a writ of certiorari to review and correct decisions of the Commissioner of Taxation. Section 24 of the Act of 1857 was reenacted as section 20 of Chapter 302 of the Act of 1859; writs issued under the Act reviewed questions of illegality and overvaluation only (Marlborough Hotel Co. v. Feitner, 33 Misc. 293, 297). In 1882, the State legislature consolidated all existing legislation in regard to the City of New York and the Act of 1859 was reenacted as L. 1882, ch. 410, section 821. In 1885, the legislature, fearing that the general tax act of 1880, which for the first time allowed review of inequality as well as illegality and overvaluation (L. 1880, ch. 296, section 1), might be deemed to apply to the City of New York, passed an amendment to section 821 of the Consolidation Act by which the writ of certiorari in New York City was confined to questions of illegality and overvaluation. The Supreme Court was precluded from exercising by the writ the power to review assessments in the City of New York which were unequal. (1 Columbia Law Review 419, 422 [1901]), while in the remainder of the State, under L. 1880, such review was available. This dichotomy between the State and City limiting review by

certiorari to the grounds of illegality and overvaluation in the City was held not violative of the equal protection clause of the 14th amendment; such constitutional provision, it was held, did not prohibit local or special legislation (People ex rel. Second Avenue R.R. Co. v. Coleman, 21 New York State Rep. 178; People ex rel. Manhattan R. R. Co. v. Coleman, 48 Hun. 602). It is beyond argument that the legislature was conscious of the particular problems associated with taxation of realty within the City and the need for special treatment.

With the creation of Greater New York by the Incorporation of the Counties of Kings, Queens, the Bronx and Richmond, there existed property owners who, before incorporation into the City, had the right to proceed on whole roll inequality under L. 1880, ch. 296. Accordingly, when the Charter for Greater New York was passed (L. 1897, ch. 378), the Act of 1880 (General Tax Law) was closely adhered to and by section 906 of the Charter, real estate assessments were allowed to be questioned by writ of certiorari on the ground of inequality.[2] Recognizing its force and effect as special legislation controlling over the general tax law (L. 1896, ch. 908), a number of cases held that to the extent the Charter differed from the general tax law, the Charter, as special legislation, was controlling (People ex rel. Zollikoffer v. Feitner, 34 Misc. 299; aff'd 63 App. Div. 615, aff'd 168 N.Y. 674; People ex rel. Lazarus v. Feitner 65 App. Dv. 318; aff'd 169 N.Y. 604; People ex rel. Stewart v. Feitner, 95 App. Div. 481).[3]

---

2. Ash, Greater New York Charter, 1897 "Report of the Committee on Draft of Proposed Charter" p. CXXII.

3. A continuing distinction between State and City remained under the Charter for Greater New York since City residents could not challenge as unequal personal property assessments while outside the City petitioners had such right.

Whole roll inequality was to be the law in the City of New York for but four years (1897-1901) for, in 1901, without the acceptance of the City of New York, the legislature amended the Charter (L. 1901, ch. 466, section 906). The statutory standard of inequality was changed and much narrowed to require of petitioners an

> • • • that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or selection or other real estate on the tax rolls of the City for the same year, specifying the instances in which such inequality exists. • • •

For an example of implementation of the "like character" standard see People ex rel. O'Neil v. Purdy, 188 App. Div. 485 (1919). For an example of the application of like character inequality outside New York see Mason v. Board of Review, Madison County, Iowa, 250 Iowa 291, 93 N.W. 2d 732. Section 166.1-0 of the Administrative Code of the City of New York setting forth the present statutory standard is replication of the standard contained in the Charter of 1901.

The City of New York Administrative Code provisions dealing with real estate taxation within the City are special legislation controlling over the general statute (N.Y. Const., Art. 12, section 2 [1924]). The New York City Administrative Code is the successor legislation to the 1901 Charter of the City of New York and was passed by a two-third vote of the legislature on emergency message and message of necessity from the Governor. The Administrative Code became law in December, 1937. The 1937 codification segregated the various provisions of the Greater New York Charter and related laws into: (a) a simpler form of Charter containing essentially the structural parts of City government and (b) an Administrative Code.

The City of New York assesses income property at a higher percentage of market value than private residential properties. This is classification. Implicit in a duly authorized system of classified assessments is the authority to fractionally assess. For properties to be assessed at different proportionate valuations, some property must be assessed at a percentage less than 100 percent of fair market value. This conclusion is not simply one of logical inference, since the State legislature, in authorizing the City taxing authority to equalize the tax burden, recognized this as early as 1857. (L. 1857, ch. 677, Sec. 13; L. 1859, ch. 302, Sec. 11; L. 1882, ch. 410, Sec. 819; L. 1897, ch. 378, Sec. 899; L. 1901, ch. 466, Sec. 899 continued to date Administrative Code Sec. E17-130). Equalization and inequality are not interchangeable terms. People ex rel. Yaras v. Kinnaw, 303 N.Y. 224, 239. As of 1901, the City of New York had authority under special legislation to fractionally assess, classify its tax roll and equalize its assessments. Where the power to classify exists, an inequality action can only be determined within the class. This remains the case today within the City of New York, which has legally classified its tax roll, unchanged by Hellerstein v. Assessor of the Town of Islip, 37 N.Y. 2d 1, which declared fractional assessments illegal in jurisdictions that have classified without authority of law. If every taxing authority outside the City of New York taxed at a uniform fraction of value, the petitioner in Hellerstein would have had no cause to complain. In fact, the essence of petitioner's complaint in Hellerstein was that he was unequally assessed and that, because the entire tax roll was fractionally assessed, he was at a distinct disadvantage in establishing that unequal treatment. Fractional assessments hide inequality Hellerstein, supra at 13.

A simple solution to the consternation caused by this landmark decision's mandate of full valuation, where some

property owners have enjoyed favorable treatment at the hands of assessors is to value property at full value and with authority classify the tax rate in accordance with the longstanding practice in the particular jurisdiction. Discrimination will then be open, aboveboard and legally constituted.

A legally constituted reasonable standard of classification does not violate the United States Constitution. Equal protection does not require identity of treatment, but only that classification rest on real not feigned differences, that the distinction have some relevance to the purpose for which classification is made. Walters v. City of St. Louis, 347 U.S. 231; Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232; Allied Stores of Ohio v. Bowers, 358 U.S. 522; Roosevelt Raceway v. County of Nassau, 18 N.Y. 2d 30. Nearly one hundred years ago, in 1885, the legislature recognized the special needs of the City of New York and the difficulty of equating the tax value of commercial properties with that of residences.

Section 166-1.0 of the Administrative Code, authorizes a classified system of taxation within the City of New York. The section requires the complaining taxpayer to demonstrate unequal treatment by comparison with "other real property of like character in the same ward or section . . ." It continues "or other real property on the assessment rolls of the City for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby." The only tenable construction of this statute is that a taxpayer is in the first instance required to prove unequal treatment as against other property of like character in the same wad or section. A modern Park Avenue office building will have no difficulty in finding properties of like character in the immediate locale with which to compare its ratio of assessment: market value. Place this same

building in Rego Park, Bensonhurst, Staten Island or Riverdale and the likelihood of finding like character property would be remote. Where the protesting taxpayer is unable to demonstrate inequality as against property of like character within the ward or section, the universe of comparison is expanded to other real property of like character on the assessment rolls of the City.

Construction of section 166-1.0(b)(3) as permitting proof of inequality: on the basis of a restrictive like character classification; or alternatively as against any and all properties roll-wide regardless of like character is logically repugnant because:

(1) The City of New York has and continues to discriminate between private residences and income property as to the tax burdens levied.

(2) Property owners and the specialized certiorari bar have recognized over the past seventy-nine years that the City has so discriminated and have not urged whole-roll inequality. Over these same seventy-nine years, more than 60 million assessments have been levied in the City of New York and not once have they served as a basis for a roll-wide demonstration of inequality. Petitioner, in his extensive memoranda, submitted in support of this motion (p. 2) cites Stewart v. Feltner, 95 App. Div. 481 (1st Dept. 1904) and Mutual Reserve Fund Life Association v. Feltner, NYLJ Vol. 34, No. 66, Dec. 29, 1905, p. 1, as indicating that inequality proceedings were the norm in the early part of the century. While subsequent to the 1901 Charter, these cases dealt with petitions for taxes levied prior to its enactment, that is, these cases dealt with whole-roll inequality under the City Charter of 1897. Since the Charter of 1901 restricting proof to like character, inequality proceedings within the City became virtually non-existent indicating ac-

knowledgement that assessors acted under authority of law in classifying property for tax purposes and that the standard of proof was intraclass inequality.

(3) A consideration of the historical development of present Administrative Code section 166-1.0 clearly indicates the intention of the State legislature to establish a different standard of proof of inequality in the City of New York and hence a different standard of assessment than is applicable elsewhere in the State.

(4) The Legislative enactment of a dichotomy in the proof of inequality within the City (like character) as compared to the rest of the State (whole-roll) was understood by the property owners and legal community who certainly owned and represented properties within as well as outside the City and who recognized and adapted to the different standard of assessment. Every tax certiorari proceeding outside the City of New York (except illegality) was and still is an inequality action whereas inequality actions within the City have been as rare as a robin in December.

In view of the foregoing and reiterating that the City of New York has the authority to fractionally assess and classify its tax roll under the Administrative Code section 166.01 as special legislation, RPTL section 37 is inapplicable to an inequality action in the City of New York (as is RPTL sec. 706) and petitioner's objections to this section as unconstitutional are of no moment.

Too, the objections raised to section 720(3) L. 1979, ch. 126, sec. 2, which presently precludes the use of the SBEA rate in a certiorari proceeding are without merit. The prescient statement of Gabrielli J. in Guth Realty v.

Gingold, 34 N.Y. 2d 440, 451 that "of course, the taxing authority will always be entitled to show that the equalization ratio is inappropriate to the taxing unit, to the category of property involved and to the particular property for any other valid reason which would affect its relevancy or weight" could not be more pertinent.

The SBEA rate as promulgated for the City of New York measures the ratio of total assessed valuation of property in the City against the total market value of realty within the City. The rate thus projected reflects a whole roll ratio. It cannot, under any circumstances, be used as a reliable measure of intraclass inequality (like character).

As discussed by Justice Hogan in 860 Executive Towers v. Board of Assessors, County of Nassau (84 Misc. 2d 525, 540), the basis for determining State equalization rates is a survey made by the SBEA once every two or three years. For example, State rates for 1976 were based on 1973 and 1974 market levels. This time delay aspect of State rates were they legally permitted at all in certiorari proceedings is an additional reason why they are inappropriate to the City of New York. A miniscular number of the City's parcels (2,911 office buildings), approximately one-third of 1 percent, make up almost 22 percent of the tax base of the City, exclusive of utilities and special franchises. Office buildings constitute 43 percent of the tax base of New York County and over 9 percent of the total assessed valuation within the State of New York. Yet these same parcels represent but .00062 of the tax parcels in the State. Real estate is an industry in the City of New York, a very vital industry, and value fluctuations experienced by major office buildings within the business cycle, together with the time delay in development of State rates, make these rates an unacceptable and inappropriate measure of inequality within the City of New York. This would be true even if the rates were promulgated on

a class basis, which they are not, assuming that a time delay was still the case. This single fact is sufficient basis for the rejection of the rate within the City of New York.

Even if the City tax rolls were unclassified, the Court finds no merit to petitioner's claim of constitutional deprivation by reason of enactment of a statute prescribing the use of the SBEA rate. The legislature acted within its authority to alter rules of evidence, to which litigants possess no vested right.

The findings herein are in no way contrary to the holding in Rokowsky v. Finance Administrator (41 N. Y. 2d 574 aff'g no opinion 51 A. D. 2d 694 aff'g 80 Misc. 2d 801). The issue in Rokowsky arose when a taxpayer sought, under authority of Guth v. Gingold (supra), to prove inequality on the basis of the SBEA rate promulgated for Bronx County. Respondent Tax Commission, cross-moved and sought technical dismissal contending the taxpayer's pleading did not comply with Administrative Code 166-1.0. The question whether section 166-1.0 was a special statute was not raised at Special Term or in the Appellate Division. The question presented to the Court of Appeals was "Does Administrative Code section 166-1.0 require that a taxpayer plead inequality only on a citywide basis, thereby ignoring inequities that arise within the individual borough and in disregard of the separate tax rate for each borough?" (See petitioner-respondent's brief Court of Appeals, p. 4.)

On this narrow issue, the Court of Appeals held "Since the City equalization rate * * * is available, it should control insofar as equalization rates may now be used to establish 'true' value * * *" (Guth Realty v. Gingold, 34 N. Y. 2d 440, 449). The holding in Rokowsky certainly does not preclude a local taxing authorite from challenging the use of the equalization rate per se and as inappropriate to the taxing unit or to the category of property (Guth Realty v. Gingold, supra 451).

To the implicit question raised by Rokowky, i.e., the extent that the equalization rate may be used as a measurement of inequality within the City of New York, the answer is not at all.

Petitioner seeks as part of this motion access to the sales data taken from the Real Property Transfer Tax Returns filed by taxpayers pursuant to Title II. Chapter 46, Section II 46-15.0 of the Administrative Code of the City of New York. With this information, petitioner, should it be unable to use the SBEA rate as a measurement of inequality, seeks to establish a roll-wide ratio based upon actual sales. Because a roll-wide ratio is neither appropriate or relevant to the determination of intraclass inequality, the motion directed towards discovery is denied. A further reason for denial may be found in Administrative Code, Section II 46-15.0 which makes such disclosure unlawful.

The pending tax petitions are consolidated and the motion in all other respects denied.

Within ten days of this decision, movant shall serve upon respondent a demand for admission of percentage of full value at which the subject property is assessed. Should respondent fail to so stipulate and the parties not agree on the parcels to be appraised, application to select the parcels is to be made without delay to this Court. On Aug. 17, 1980, the parties shall simultaneously file a statement or tabulation of the appraised values placed upon the selected parcels. Appraisals and/or sales otherwise are to be exchanged in accordance with the rules of this Court. The appraisals are to conform with the appraisal format available from the Clerk of this Part. All appraisals and sales shall include the cubic foot area of the improvements.

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 168

ORDER DENYING MOTION FOR REARGUMENT, ENTERED MARCH 23, 1982

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,
Respondents-Appellees,

AND

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

No. 642

**DECREE APPEALED FROM,
ENTERED JANUARY 7, 1982**

In *Matter of Equitable Life Assur. Soc. v. Finance Administrator:* Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

The portion of the opinion of the Court of Appeals of New York, which is the decision from which this appeal is taken, modifying the order of the Appellate Division and, as so modified, affirming it, is set out above. No separate judgment or decision was entered by the Court of Appeals in this matter.

COURT OF APPEALS
STATE OF NEW YORK

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner-Appellant,

—against—

THE FINANCE ADMINISTRATION AND TAX COMMISSION OF THE CITY OF NEW YORK,
Respondent-Respondent,

—and—

ROBERT ABRAMS,
Attorney General of the State of New York,
Intervenor-Respondent.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1257(2), Appellant, The Equitable Life Assurance Society of the United States, appeals to the Supreme Court of the United States from so much of the decision of the Court of Appeals of the State of New York, entered January 7, 1982, as denied Petitioner-Appellant the right to rely on the aggregate ratio of assessment-to-fair market value in the City of New York, as promulgated by the State Board of Equalization and Assessment.

Dated: New York, New York
March 22, 1982

Yours, etc.,

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Petitioner-Appellant
430 Park Avenue
New York, New York 10022

TO: Joseph W. Bellacosa, Esq.
Clerk, Court of Appeals
State of New York
Albany, New York 12207

Frederick A.O. Schwarz, Jr.,
Corporation Counsel
Attorney for Respondent-Respondent
100 Church Street
New York, New York 10007

Robert Abrams, Attorney General
of the State of New York
Two World Trade Center
New York, New York 10047

Filed with the Court of Appeals of New York on March 29, 1982. Served on the Department of Law of the State of New York and the Corporation Counsel of the City of New York on March 26, 1982.

Supreme Court of the United States

No. A-1080

EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Appellant

v.

FINANCE ADMINISTRATION AND
TAX COMMISSION OF THE CITY OF NEW YORK
AND ROBERT ABRAMS, ETC.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby, extended to and including August 20, 1982.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of June, 1982.

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION, BLOCK 1374, LOT 49 S.E. ("Greenfeld Affidavit I")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In The Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL S. GREENFELD, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for petitioner in the above-entitled action. This affidavit is made in support of petitioner's motion for an order pursuant to Rules 3211(b) and 3212(e) and Section 2201 of the Civil Practice Law and Rules:

(A) Dismissing, on the ground that they are without merit and granting partial summary judgment

with respect to the following defenses in this action relative to the use by petitioner of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") for the purpose of establishing a cause of action based on inequality under Section 166-1.0 (b)(3) of the Administrative Code of the City of New York and under Sections 306, 307, 706 and 720 of the Real Property Tax Law of the State of New York;

(i) that use of the Equalization Rate is precluded because Section 166-1.0(b)(3) of the Administrative Code of the City of New York by its terms authorizes a classified system of assessment for real property tax purposes, which system exists in fact; and

(ii) that no other section of the Administrative Code, specifically Sections E17-8.0 and E17-11.0(b), mandates that New York City value all property at full market value or bars the use of any system of classification that would result in any property being assessed at anything less than fair market value for the purpose of imposing real property taxes; and

.... (iii) that use of the Equalization Rate is barred by Sections 307 and 720 of the Real Property Tax Laws of the State of New York;

(B) Alternatively, should the first part of this motion be denied, staying the trial of the action pending the appeal from said denial, which appeal is to be taken on as expedited a basis as the appellate courts will allow.

2. The proceedings herein were brought pursuant to Article 7 of the Real Property Tax Law to review the real

property tax assessments fixed upon petitioner's property at 645-651 Madison Avenue, Manhattan, also known as Block 1374, Lot 49SE. The tax years are 1972-73 through 1979-80. Copies of the petitions for said tax years are annexed hereto as Exhibits A-1 through A-8, respectively.

3. On November 2, 1979, this action was placed on the inequality calendar of this Court. On June 18, 1980, notification was received from the Court that the case has been assigned a trial date of October 30, 1980. A copy of that letter is annexed hereto as Exhibit B. On the 15th day of July, 1980, we received a copy of a Court calendar indicating that the trial of this action had been set for October 15, 1980. A copy of that calendar is annexed hereto as Exhibit C. No formal notice of a change of the trial date has been given as of this date. Although counsel for petitioner did not appear in Court on the July 15, 1980 date, we have subsequently become aware that attorneys appearing in Court on the aforesaid date, were advised by the Court that application to select comparable parcels must be made no later than September 11, 1980; if the parties agree on comparable parcels, a tabulation of appraised values is to be filed no later than October 6, 1980. Petitioner has failed to receive notice from the Court of the aforesaid two dates as of the date of this affidavit.

4. As shown in the accompanying memorandum of law, this Court in *In the Matter of Colt Industries Inc. v. Tax Comm.* (N.Y.L.J. June 4, 1980), barred use of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") in inequality proceedings in the City of New York and held that inequality could be established in New York City only by the use of selected parcels or sales of property of like character—at least initially—located in the same section in which the subject property is located. This decision is directly contrary to holdings

of the Supreme Court in Kings County and Queens County and appears to be contrary to the holding of the New York State Court of Appeals in *Rokowsky v. Finance Administration of the City of New York*, 41 N.Y.2d 574, 394 N.Y.S.2d 176 (1977). The decision also appears to be directly contrary to the repeated mandates in the New York City Administrative Code requiring that all property be valued at full fair market value and be so placed on the tax rolls of the City. The decision further contravenes petitioner's right to due process and equal protection guaranteed by the Constitutions of the United States and the State of New York.

5. At a session of this Court held on the 15th day of July, 1980 at which were heard a number of motions requesting a stay of the trial of certain inequality actions, this Court denied such applications for stay; stated an affirmation of the Court's decision in *Colt, supra;* and further stated an intention to try such actions on the basis of the principles enumerated in *Colt.*

6. It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that *Colt* was incorrectly decided. Certainly, these issues have not been fully addressed by the appellate courts of this state and, to the degree that they have been so addressed, appear contrary to the holding in *Colt.* We therefore urge that this Court reconsider its decision in *Colt* and grant the relief requested in the first branch of the instant motion.

7. Alternatively, should this Court determine to deny such motion, we respectfully request the opportunity to appeal such determination prior to the trial of this action, now scheduled for October 15, 1980. We would immediately file a notice of appeal with the Appellate Division, First Department, and request expedited treatment at every stage of the appellate process. We most respectfully request that the trial of this action be stayed

during the pendency of such appeal. We believe it fundamentally unfair and a basic deprivation of due process for petitioner to be compelled to try such action while the law is in such a state of flux and uncertainty. We know of no damage that would be caused respondents by virtue of such stay and we can conceive of none. In the absence of a stay, respondents as well as petitioner would be compelled to incur the expense of this proceeding with knowledge that such exercise may ultimately be determined to have been unnecessary or futile. An estimate of the potential costs of such action is set forth in the annexed affidavit of Jerome Haims.

8. We further respectfully request that this motion be granted expedited treatment so that in the event the substantive portion of this motion is denied, we may proceed with the appellate process and allow the appellate courts to give their guidance in this unsettled and uncertain area of law.

WHEREFORE, it is respectfully requested that the substantive portion of this motion be granted in all respects and, alternatively, that the trial of this action be stayed during the pendency of petitioner's appeal from the denial of the substantive aspects of this motion.

DANIEL S. GREENFELD
Daniel S. Greenfeld

Sworn to before me this
28th day of July, 1980
A. PATRICIA GOLD
Notary Public

A. PATRICIA GOLD
Notary Public, State of New York
No. 31-4637548
Qualified in New York County
Commission Expires March 30, 1982

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION, BLOCK 1291, LOT 69 ("Greenfeld Affidavit II")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In The Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56322/77
Block 1291, Lot 69

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL S. GREENFELD, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for petitioner in the above-entitled action. This affidavit is made in support of petitioner's motion for an order pursuant to Rules 3211(b) and 3212(e) and Section 2201 of the Civil Practice Law and Rules:

(A) Dismissing, on the ground that they are without merit and granting partial summary judgment with respect to the following defenses in this action relative to the use by petitioner of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") for the purpose of establishing a cause of action based on inequality under Section 166-1.0 (b)(3) of the Administrative Code of the City of New York and under Sections 306, 307, 706 and 720 of the Real Property Tax Law of the State of New York;

(i) that use of the Equalization Rate is precluded because Section 166-1.0(b)(3) of the Administrative Code of the City of New York by its terms authorizes a classified system of assessment for real property tax purposes, which system exists in fact; and

(ii) that no other section of the Administrative Code, specifically Sections E17-8.0 and E17-11.0(b), mandates that New York City value all property at full market value or bars the use of any system of classification that would result in any property being assessed at anything less than fair market value for the purpose of imposing real property taxes; and

(iii) that use of the Equalization Rate is barred by Sections 307 and 720 of the Real Property Tax Laws of the State of New York;

(B) Alternatively, should the first part of this motion be denied, staying the trial of the action pending the appeal from said denial, which appeal is to be taken on as expedited a basis as the appellate courts will allow.

2. The proceedings herein were brought pursuant to Article 7 of the Real Property Tax Law to review the real property tax assessments fixed upon petitioner's property at 717 Fifth Avenue, Manhattan, also known as Block 1291, Lot 69. The tax years are 1977-78 through 1979-80. Copies of the petitions for said tax years are annexed hereto as Exhibits A-1 through A-3, respectively.

3. On February 27, 1980, this action was placed on the inequality calendar of this Court. On the 15th day of July, 1980, we received a copy of a Court calendar indicating that the trial of this action had been set for October 15, 1980. A copy of that calendar is annexed hereto as Exhibit B. No formal notice of a trial date has been given as of this date. Although counsel for petitioner did not appear in Court on the July 15, 1980 date, we have subsequently become aware that attorneys appearing in Court on the aforesaid date, were advised by the Court that application to select comparable parcels must be made no later than September 11, 1980; if the parties agree on comparable parcels, a tabulation of appraised values is to be filed no later than October 6, 1980. Petitioner has failed to receive notice from the Court of the aforesaid two dates as of the date of this affidavit.

4. As shown in the accompanying memorandum of law, this Court in *In the Matter of Colt Industries Inc. v. Tax Comm.* (N.Y.L.J. June 4, 1980), barred use of the New York City-wide equalization rate propounded by the New York State Board of Equalization and Assessment ("Equalization Rate") in inequality proceedings in the City of New York and held that inequality could be established in New York City only by the use of selected parcels or sales of property of like character—at least initially—located in the same section in which the subject property is located. This decision is directly contrary to holdings of the Supreme Court in Kings County and Queens County

and appears to be contrary to the holding of the New York State Court of Appeals in *Rokowsky v. Finance Administration of the City of New York*, 41 N.Y.2d 574, 394 N.Y.S.2d 176 (1977). The decision also appears to be directly contrary to the repeated mandates in the New York City Administrative Code requiring that all property be valued at full fair market value and be so placed on the tax rolls of the City. The decision further contravenes petitioner's right to due process and equal protection guaranteed by the Constitutions of the United States and of the State of New York.

5. At a session of this Court held on the 15th day of July, 1980 at which were heard a number of motions requesting a stay of the trial of certain inequality actions, this Court denied such applications for stay; stated an affirmation of the Court's decision in *Colt, supra;* and further stated an intention to try such actions on the basis of the principles enumerated in *Colt.*

6. It is respectfully suggested, for the reasons shown in the accompanying memorandum of law, that *Colt* was incorrectly decided. Certainly, these issues have not been fully addressed by the appellate courts of this state and, to the degree that they have been so addressed, appear contrary to the holding in *Colt.* We therefore urge that this Court reconsider its decision in *Colt* and grant the relief requested in the first branch of the instant motion.

7. Alternatively, should this Court determine to deny such motion, we respectfully request the opportunity to appeal such determination prior to the trial of this action, now scheduled for October 15, 1980. We would immediately file a notice of appeal with the Appellate Division, First Department, and request expedited treatment at every stage of the appellate process. We most respectfully request that the trial of this action be stayed during the pendency of such appeal. We believe it funda-

mentally unfair and a basic deprivation of due process for petitioner to be compelled to try such action while the law is in such a state of flux and uncertainty. We know of no damage that would be caused respondents by virtue of such stay and we can conceive of none. In the absence of a stay, respondents as well as petitioner would be compelled to incur the expense of this proceeding with knowledge that such exercise may ultimately be determined to have been unnecessary or futile. An estimate of the potential costs of such action is set forth in the annexed affidavit of Jerome Haims.

8. We further respectfully request that this motion be granted expedited treatment so that in the event the substantive portion of this motion is denied, we may proceed with the appellate process and allow the appellate courts to give their guidance in this unsettled and uncertain area of law.

WHEREFORE, it is respectfully requested that the substantive portion of this motion be granted in all respects and, alternatively, that the trial of this action be stayed during the pendency of petitioner's appeal from the denial of the substantive aspects of this motion.

DANIEL S. GREENFELD
Daniel S. Greenfeld

Sworn to before me this
28th day of July, 1980
A. PATRICIA GOLD
Notary Public

A. Patricia Gold
Notary Public, State of New York
No. 31-4637546
Qualified in New York County
Commission Expires March 30, 1982

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTIONS ("Haims Affidavit")

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter Of The Application Of
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Petitioner,

—against—

THE FINANCE ADMINISTRATION AND THE
TAX COMMISSION OF THE CITY OF NEW YORK,

Respondents.

Index No. 56323/77
Block 1374, Lot 49SE
Index No. 56322/77
Block 1291/Lot 39

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JEROME HAIMS, being duly sworn, deposes and says:

1. I am a licensed real estate broker and appraiser; I am additionally a valuation consultant—with twenty-five years of continuous experience—to private investors, lending institutions, pension funds, corporations, estates, developers and federal, state and city governmental agencies. I am President of Jerome Haims Realty, Inc. and a mem-

ber of the American Institute of Real Estate Appraisers (Secretary, New York Chapter), Society of Real Estate Appraisers (Senior Real Estate Analyst), American Society of Appraisers, American Right-of-Way Association (Senior Member), the Real Estate Board of New York, New York State and National Association of Housing and Redevelopment Officials, Connecticut Urban Renewal Association, Regional Plan Association, National Association of Real Estate Boards, Urban Land Institute, and Association of Governmental Appraisers. My professional activities include lecturing at the following institutions and for the following organizations: New York University, C. W. Post College, Society of Real Estate Appraisers, National Association of Real Estate Board, and Association of Governmental Appraisers. I have been qualified to testify as a real estate valuation expert in state and federal courts.

2. I estimate the approximate costs to be incurred by the petitioner in an inequality proceeding involving an office building located in Section 5 with eight open years to be as follows:

(i) Section 5 sales analysis: $2,500,000;

(ii) Section 5 sales analysis of comparable parcels: $150,000 to $200,000;

(iii) Appraisals of comparable parcels in Section 5: $500,000 to $650,000.

The cost would be somewhat, but not proportionately, less if fewer years were open.

3. I estimate the approximate time required to assemble data and report thereon, to be as follows:

(i) Section 5 sales analysis: 1 year;

(ii) Section 5 sales analysis of comparable parcels: 1 year;

(iii) Appraisals of comparable parcels in Section 5: 22 months.

4. It is my opinion that such a matter cannot adequately be prepared for trial by an October 1980 trial date; nor is it possible to compile a tabulation of appraised values of comparable parcels within Section 5 by October 6, 1980; nor is it possible to prepare appraisals and compile sales data by the date set for exchange of materials; nor is it possible to compile sufficient material to meaningfully determine selected parcels by September 11, 1980.

JEROME HAIMS
Jerome Haims

Sworn to before me this
25th day of July, 1980.
JO-ANN HAMILTON
Notary Public

JO-ANN HAMILTON
Notary Public, State of New York
No. 03-4621206, Bronx County
Term Expires March 30, 1981

DECISION OF THE APPELLATE DIVISION IN MATTER OF COLT INDUSTRIES, INC. (A COMPANION CASE)

Murphy, P.J., Kupferman, Sandler, Markewich, Lynch, JJ.

10559

In re Application of Colt Industries, Inc.,
Petitioner-Appellant, D.David

—against—

The Finance Administrator, et ano.,
Respondents-Respondents, L.Olarsch

Robert Abrams, Attorney General of the State of New York,
Intervenor-Respondent. J.M.Farrar

Order, Supreme Court, New York County (Mangan, J.), entered on June 12, 1980, affirmed, on the opinion of Mangan, J., at Special Term, without costs and without disbursements. All concur except Murphy, P.J. who dissents in part in a memorandum as follows:

Petitioner Colt Industries, Inc. (Colt) is the owner of an office building located at 430 Park Avenue in Manhattan. Colt brought seven proceedings to review the real property tax assessment on that property for various years between 1969 and 1977. In paragraph 8 of each petition, Colt alleged:

> "8. The said assessments are erroneous by reason of overvaluation and inequality in that the same are in excess of the full value of the said real property and of the sum for which said real property under ordinary circumstances would sell as of January 25th,

1975, as shown in column '8' of Schedule 'A' and in that said assessments are proportionately higher than similar property in the City of New York, and the extent of such overvaluation is shown in column '9' of Schedule 'A'."

As will be developed more fully below, this appeal is limited to a consideration of whether the assessments on Colt's property are erroneous by reason of inequality.

In its motion at Special Term, Colt sought, *inter alia*, to have RPTL § 307 (L. 1978, ch. 476, § 1) and RPTL § 720(3) (L. 1979, ch. 126, § 2) declared to be unconstitutional. This branch of Colt's motion precipitated a discussion by Special Term of Adm. Code § 166-1.0(b)(3). This provision reads as follows:

"b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

• • •

"3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby."

Petitioner Colt construed Adm. Code §166-1.0(b)(3) as requiring that inequality in assessment be determined upon a "whole-roll" basis. Essentially, Colt maintained that the ratio of assessed valuation to full valuation was higher for its property than the ratio for all property upon

the assessment rolls in New York City. It was Colt's contention that its assessments should be adjusted downward through the use of that "whole-roll" comparison.

The respondents, on the other hand, read Adm. Code § 166-1.0(b)(3) as creating different classes of property in the five boroughs. Basically, it was respondents' belief that the petitioner's building should be compared with other high-rise office buildings in Manhattan.

Special Term adopted the respondents' reasoning and found that inequality within the boundaries of New York City must be resolved upon a "class" basis. Since Adm. Code § 166-1.0(b)(3) was special legislation covering New York City, Special Term found that RPTL § 307 was not controlling. Thus, the constitutionality of RPTL § 307 was not reached. In view of the fact that the equalization rate promulgated for the City of New York by the State Board of Equalization and Assessment (SBEA) was founded upon a "whole roll" comparison, the court at Special Term found that the SBEA rate was not a reliable measure for a "classified" system of assessment. Again, Special Term did not pass upon the constitutionality of RPTL § 720(3).

Historically, there is some indication that a "classified" system has been followed in assessing real property in New York City. Despite this historical precedent, the overriding question still remaining is whether the respondents have employed a proper method of assessment over these many years (*Hellerstein v. Assessor*, 37 N Y 2d 1, 5). In the absence of any controlling case law addressed to the correct construction of Adm. Code § 166-1.0(b)(3), this question may be approached as a novel one. The following considerations lead to the conclusion that the City of New York should follow the "whole roll" method of comparison.

First, attention should be focused upon the recent case of *Rokowsky v. Finance Administrator* (41 N Y 2d

574). The prime issue presented in *Rokowsky* was whether inequality of assessment could be established by comparison solely on the basis of the State equalization rate for a particular borough or whether the City rate must be used. In answering this question, the Court of Appeals stated, *inter alia*, that the City-wide rate must be used. In rejecting the petitioner's interpretation of Adm. Code § 166-1.0(b)(3), the Court of Appeals asserted: "A more reasonable interpretation, however, would permit comparison only with property on the assessment rolls in the aggregate." (*Rokowsky v. Finance Administrator, supra*, at 577.) This last statement by the highest court would seem to preclude any interpretation of Adm. Code § 166-1.0 (b)(3) that would permit classification of properties in New York City for purposes of assessment.

Second, Adm. Code § 166-1.0(b)(3) must be construed, if possible, to uphold its constitutionality. (McKinney's Statutes, § 150(c), pp. 321-325; *People v. Bell*, 306 N.Y. 110, 114.) In that regard, it would be unconstitutional for the City Counsel to permit the assessors to determine informally (i) the classes of real property in the City and (ii) the ratio at which each class would be taxed in relation to full value. (*Gautier v. Ditmar*, 204 N.Y. 20, 28.) Hence, another reason is presented for construing Adm. Code § 166-1.0(b)(3) in such a fashion as to find a "whole roll" rather than a "classified" system of assessment.

Third, particular cognizance must be taken of Adm. Code § E 17-8.0(b) which reads as follows:

> "b. Such statement shall contain the street, the section or ward, the block and lot and map or identification numbers of such real estate embraced within such district: the sum for which, in their judgment, each separately assessed parcel of real estate would sell under ordinary circumstances if it were wholly

unimproved: and separately stated, the sum for which the same parcel would sell under ordinary circumstances with the improvements, if any, thereon. The assessors shall include in such statement such other information as the finance administrator may, from time to time, require."

The Court of Appeals has found that the statutory test of full value is the price at which the property would sell "under ordinary circumstances." (*People ex rel. Parklin v. Miller*, 287 N.Y. 126, 129.) Consequently the respondents are obligated to assess all real property in New York City at full value. If all real property in the City is assessed at full value, then the ratio of assessed value to full value will be one to one for all property. Under such a circumstance, classes could not exist since all properties would have the same ratio of assessed to full value. Simply stated, the concepts of "full value assessment" and "classified assessment" are inconsistent, and thus can not co-exist in the same tax system. Adm. Code § E 17-8.0(b) makes it clear that New York City is on a "full value" system.

Fourth, Adm. Code § 166-1.0(b)(3) should be interpreted so as to avoid an absurd result (McKinney's Statutes, § 145, pp. 294-297). Undisputedly, a taxpayer may prove inequality by pleading and proving that the assessment ". . . has been made at a higher proportionate valuation than the assessment . . . of other real property in the assessment rolls of the city for the same year. . . ." This second portion of Adm. Code § 166-1.0(b)(3), following the disjunctive "or", needs no construction because it unambiguously refers to a "whole roll" comparison.

Inequality may also be shown with reference to the first portion of Adm. Code § 166-1.0(b)(3), preceding the word "or". A taxpayer may compare the assessment on

his property with "... other real prpoerty of like character in the same ward or section...." If the phrase "other real property of like character" is viewed as creating classes of real property, then the Code provision would create an absurd result. A taxpayer could prove inequality in assessment by either "class" comparison under the first portion or "whole roll" comparison under the second portion. To be consistent and to avoid chaos, the city's tax system may employ either "class" or "whole roll" comparison. It may not simultaneously employ these two incompatible formulae.

In order to harmonize the first portion of Adm. Code § 166-1.0(b)(3) with the second portion, the courts are given a certain degree of liberality in construing that first portion to conserve the spirit and intent of the entire section (McKinney's Statutes, § 145, p. 296). The first portion may be read in accord with the second portion if it is assumed that the "other real property of like character" has the same equalization rate as that of all the City real property. In order to facilitate the evidentiary task of a taxpayer in proving inequality, he may thus choose to establish his case through a comparison with "other real property of like character" rather than with properties selected from remote areas of the City. By seeking to prove inequality under the first portion of Adm. Code § 166-10(b)(3), it is incumbent upon the taxpayer to demonstrate that the "other real property of like character" is being correctly taxed vis-a-vis all the real property in the City. While this construction of the first portion does carry with it a minor assumption, it otherwise does give a harmonious reading to the entire section of the Administrative Code.

Where the New York City Charter and Administrative Code are silent on tax matters relating to practice, form, substance and procedural detail, resort must be had to

the provisions of the Tax Law (*People ex rel. American Sugar Refining Company v. Sexton*, 274 N.Y. 304, 306 307). However, for the reasons stated above, Adm. Code § 166-1.0(b)(3) constitutionally sets forth the pleading requirements for a tax proceeding based upon inequality. Therefore, as Special Term observed under a different construction of Adm. Code § 166-1.0(b)(3), there is no necessity for considering the constitutionality of RPTL § 307 insofar as that statute contains certain retroactive pleading requirements. Special Term properly denied as academic the branch of the motion to declare RPTL § 307 unconstitutional. Had that constitutional issue been reached, subdivisions 3, 4 and 5 of section 307 would have been declared unconstitutional for the reasons enumerated in *Slewett & Farber v. Board of Assessors* (— A D 2d —, 435 N.Y.S. 2d 313, upon reargument, — A D 2d —, N.Y.L.J., 4/13/81, p. 1, col. 2).

Neither the New York City Charter nor the Code sets forth the evidence that may be adduced in a tax proceeding challenging an assessment. Hence, resort must be had to section 720 of the Real Property Tax Law. Under the most recent amendment to RPTL § 720(3), a taxpayer may no longer use the SBEA equalization rate in proving inequality in any proceeding commenced after January 1, 1970, and not finally determined as of the effective date of the amendment, May 22, 1979 (L. 1979, ch. 126).

The legislature has the general power to prescribe rules of evidence and methods of proof. However, the legislature would violate due process of law if it passed a statute that would practically shut out the evidence on a particular point. (*Board of Commissioners of Excise v. Merchant*, 103 N.Y. 143, 148.) Despite the 1979 amendment to RPTL § 720(3), Colt may still prove inequality through the sample or the sales method. Hence, it can

not be said that the Legislature has closed off all avenues of proof.

Nonetheless, the 1979 amendment may not be viewed in a vacuum. That amendment was clearly part of a concerted legislative effort to forestall the consequences of the *Hellerstein* decision. Prior to the 1979 amendment, comparison with the SBEA rate was the simplest and surest method of establishing inequality (*Guth Realty v. Gingold*, 34 N Y 2d 440, 450). The legislature, through the 1979 amendment, thus removed the most direct and certain method of proving inequality for a reason totally unrelated to the validity of the SBEA rate. To the extent that the 1979 amendment represents an unfair legislative attempt to deprive Colt of effective redress in both the administrative and judicial forums, it deprives Colt of due process. RPTL § 720(3) should be declared unconstitutional insofar as it is retroactively operative against Colt's pending petitions that cover periods prior to its effective date of May 22, 1979. (*Contra, Slewett & Farber v. Board of Assessors, supra.*) It is unnecessary to reach the question of whether that statute may be validly applied against (i) a petition brought after the effective date to cover a tax period prior to the effective date and (ii) a petition brought after the effective date to cover a tax period after the effective date.

Accordingly, the order of the Supreme Court, New York County (Mangan, J.), entered June 12, 1980, insofar as appealed from, which, *inter alia*, denied the branch of the motion to declare RPTL § 720(3) unconstitutional, should be modified, on the law, by declaring RPTL § 720 (3) to be unconstitutional insofar as it is retroactively operative against pending petitions covering tax periods prior to May 22, 1979, and as modified, it should be affirmed.

Order filed.

OPINION OF JUDGE FARLEY (SUP. CT. NASSAU CO.) IN CANIGIANI v. BOARD OF ASSESSORS, SLIP OPINION

R:2,1

SUPREME COURT, NASSAU COUNTY—
SPECIAL TERM, PART IV (Cal.No.8T0052)

In the Matter of
JOSEPH N. CANIGIANI,
Petitioner,

vs.

THE BOARD OF ASSESSORS AND THE BOARD OF ASSESSMENT REVIEW OF THE COUNTY OF NASSAU, Respondent.

BY FARLEY, J.

DATED June 29, 1981.

INDEX No. 15394/74

KOEPPEL, SOMMER, LESNICK & MARTONE, P.C.
Attorneys for Petitioner
155 First Street
Mineola, New York 11501
By: Bernard Sommer, Esq.
Saul Fenchel, Esq.

EDWARD G. MCCABE, ESQ.
County Attorney of Nassau County
Attorney for Respondent
Nassau County Executive Building
1 West Street
Mineola, New York 11501
By: Jay M. Herman, Esq.

MEMORANDUM

The question to be answered in this litigation is whether a statute that abolishes a method of proof in a tax review proceeding based on inequality of assessment is rendered unconstitutional where the alternative means

of establishing inequality (ratio) are so prohibitively expensive as to preclude their use by aggrieved taxpayers.

Section 2 of Article 16 of the Constitution of the State of New York provides:

> "The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. Assessments shall in no case exceed full value."

Article 7 of the Real Property Tax Law sets forth the procedure by which taxpayers may secure a judicial review of the assessments levied against real property. One of the grounds upon which a proceeding may be founded is inequality in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll (RPTL § 706). "In an inequality case, the task is to make . . . a comparison between the rate of assessment of the subject property—i.e., the proportion of its assessed value to its full value—and the rates of assessment of a fair sampling of properties throughout the tax district." (*Matter of Wolf v. Assessors of the Town of Hanover*, 308 N. Y. 416, 421, citations omitted.) Consequently, the taxpayer must prove not only the ratio at which property in the tax district is assessed, but also that his own parcel is assessed at a higher rate (*People ex rel Yaras v. Kinnaw*, 303 N. Y. 224). The evidence that may be presented on the issue of whether an assessment is unequal is limited under subdivision 3 of section 720 of the Real Property Tax Law. The proof is restricted to the so-called parcel selection system with the exception that the statute permits . . . . evidence to be given by either party as to (1) actual sales of real property within the assessing unit that occurred during the year in which the assessment was made, and (2) the state equalization rate established for the roll containing the

assessment under review." (RPTL § 720[3]). This last method of proving ratio was barred to litigants when the legislature in 1979 deleted that portion of section 720 that allowed for the introduction in evidence of state equalization rates (Laws 1979, c. 126, § 2, eff. May 22, 1979).

This court held the prohibition against the use of the state rates unconstitutional (*Industrial & Research Associates v. Board of Assessors of the County of Nassau*, N.O.R., Index No.13281/73, decision dated Aug. 2, 1979). The Appellate Division reversed this determination [1] and found the statute constitutional, stating, in part:

> "What the Constitution certainly does prohibit is *de facto* abolition of remedy by limitation of proof to methods so prohibitively expensive in comparison with other potentially probative means as to effectively deprive all but the highly affluent of the ability to establish the right to relief. *On the limited record before us, petitioners have not established that the cost of proving actual sales is so exorbitant as to render the method illusory.*" (Italics added.)

and concluding:

> "So constricted in our inquiry, we must conclude that the constitutionality of subdivision 3 of section 720 of the Real Property Tax Law has not been established here because *it still seems* to offer proof of actual sales as a means by which inequality may be proven." (*Slewett & Farber v. Board of Assessors of*

1. This court's decision in *Slewett & Farber v. Board of Assessors of the County of Nassau*, 97 Misc 2d 637, was rendered before the enactment of Laws 1979, c. 126, and the appeal in the *Industrial & Research* case was not perfected when the Appellate Division heard arguments on *Slewett & Farber*. The Appellate Division, however, taking cognizance of the law at the time of the appeal, considered the constitutionality of the enactment when deciding *Slewett & Farber*.

the County of Nassau, — A D 2d —, NYLJ April 13, 1981, pp. 1, 20-23).

Following the decision of the Appellate Division, the petitioner in this proceeding, by motion, requested the court to vacate its decision—which had adopted the state equalization rates as proof of ratio—and to reopen the trial to hear evidence on the cost of establishing actual sales of real property that occurred in Nassau County for each of the years at issue (May 1, 1974 through May 1, 1980). That application was granted.

The point advanced by petitioner is that the legislative prohibition against the use of the state equalization rates as proof of ratio constitutes a deprivation of the right to review his assessment founded on a claim that an unequal share of the tax burden has been imposed on it, since the two alternative methods of proof allowed by section 720 (the sample parcel selection and cost of sales) are illusory because of the enormous expense associated with their employment. Petitioner further contends the Appellate Division recognized his dilemma but left open an adjudication of his rights because the record was devoid of evidence as to the cost of establishing ratio by proof of sales. This court, in reopening the trial to admit evidence of the cost of sales, is not unmindful that the Appellate Division refrained from expressly holding that the costs of proving ratio by the parcel selection method was unconstitutionally too expensive. After reviewing the *860* and *Guth* cases,[2] Mr. Justice Lazer, in *Slewett & Farber*, reflected:

2. *Guth Realty, Inc. v. Gingold*, 34 N Y 2d 440; *860 Executive Towers v. Board of Assessors of County of Nassau*, 84 Misc 2d 525, affd 53 A D 2d 463, affd *sub nom. Matter of Pierre Pellaton Apts. v. Board of Assessors of County of Nassau*, 43 N Y 2d 769.

> "But if parcel selection seems an unconstitutionally expensive method by which to prove inequality, it is not the exclusive method for the challenged statute also permits proof of sales." (*Slewett & Farber v. Board of Assessors of the County of Nassau, supra*).

That issue should not be skirted. Repeated reference to the prohibitive expenses incurred in proving ratio by the parcel selection system attest to both its impracticality and uselessness as a viable remedy (*860 Executive Towers v. Board of Assessors of County of Nassau, supra; Guth Realty, Inc. v. Gingold, supra; People ex rel Hagy v. Lewis*, 280 N. Y. 184). The court also takes judicial notice that there are over 400,000 separate tax parcels within Nassau County. The selection of sample parcels from this number as shown by the record in the *860* case involves an expenditure of time and money that renders the ascertainment of ratio by this method a travesty of justice to all taxpayers, rich and poor alike. The Appellate Division, in *Slewett & Farber*, fully recognized that this method of proof is an illusory evidentiary tool without a shadow of a doubt, and it behooves the courts to give final recognition to this well known fact. Certainly, Mr. Justice Lazer's plurality opinion, by its recital of the history of the *Guth* and *860* cases, implies no less. The court, in reopening this proceeding, accordingly did so for the limited purpose of taking testimony on the cost of sales.

Immediately prior to the date this hearing was scheduled to commence, the respondent had secured a temporary stay of all further proceedings from the Appellate Division. The court thereafter proceeded to hear testimony with respect to the cost of sales in another proceeding appearing on its calendar (*see Wilmar Construc-*

tion Corp. v. Board of Assessors of County of Nassau, Index No. 13315/71). When that testimony was completed, but before evidence of value was presented, the respondent obtained another temporary stay of 35 proceedings pending on this court's calendar, including the *Wilmar* case. Both stays were subsequently lifted, and the hearing in this proceeding resumed. At that time, petitioner requested leave to introduce by reference all the testimony received in *Wilmar* without prejudice to respondent's right to recall any of the witnesses it chose to cross examine, and without prejudice to its right to present any rebuttal evidence it deemed advisable. This motion was granted.

On this hearing, respondent adopted the same position it did in the *Wilmar* case, i.e., it offered no testimony on the cost of a sales survey and refrained from cross-examining any witnesses called by petitioner. The gist of respondent's objection to receipt of this testimony is that an Article 7 proceeding is not the proper vehicle for testing the constitutionality of the statute. However, counsel for the respondent failed to inform the court what procedural devices and advantages would be available in a declaratory judgment action that would be foreclosed to it on this hearing. The issue is simple and clearly defined. The court finds no need for further refinement by pleadings or discovery proceedings.

The witnesses produced by petitioner in the *Wilmar* proceeding whose testimony was incorporated in this case numbered eight. The first, Tracie Peddy, who examined the Nassau County Clerk's records with respect to conveyances, testified as to the number of transactions listed from May 1 through April 30 of each year for the period from 1970 through 1979. They were as follows:

Year	*Transactions Recorded*
May 1, 1970	27,176
May 1, 1971	30,889
May 1, 1972	33,170
May 1, 1973	28,571
May 1, 1974	26,528
May 1, 1975	25,802
May 1, 1976	27,963
May 1, 1977	29,755
May 1, 1978	30,509
May 1, 1979	31,082
Total 10 years	290,455
Average per year	29,045

Mrs. Peddy testified the County Clerk's records of conveyances listed, in addition to deeds, easements, leases, assignment of leases, lis pendens, deeds in lieu of foreclosure, and that it was not possible, without separately examining each instrument to determine its nature from the indices. She stated she examined 7,062 pages of the County Clerk's index to count the number of transactions recorded each year, and that the cost of photostating the index was 25 cents a page, or $1,765.00 for the 10-year period.

Theodore Powers, a real estate appraiser, broker, and consultant, testified he was familiar with real property transfer and mortgage records maintained by the Nassau County Clerk's Office, as well as the records and inspection practices followed by the Department of Assessment and Treasurer's Office of Nassau County. He stated that it would cost $18.56 per unit (Transaction) to confirm and verify the sales price of a conveyance, or $538,240 a

year, assuming there were an average of 29,000 transfers listed per year.

Mr. Powers' testimony outlined the various functions a person would be assigned; the number of transactions he or she would examine daily; and the per diem cost of the work. The work entailed sending the employee to the County Clerk's Office with a list of transactions that would have to be viewed from microfilm; scanning the film until the appropriate section, lot, and block were located; reading the information; making a determination of whether the transaction was eligible; abstracting the desired information, including the name, address, and telephone number of grantor, grantee, lawyer, bank, and title company, onto a form; examining mortgage libers for mortgage data; and confirming the assessment by checking the records of the assessment department. Upon returning to the office, he would be required to verify the sale by contacting, through the phone or mails, the parties, lawyers, mortgagee or title company; and thereafter complete the form to be processed by the statisticians.

Similar testimony was elicited from four other experts comprising Bernard Goodman, Eugene Albert, Howard F. Jackson, and Bruce Nagel. The last mentioned witness is the vice president of Cole, Layer, Trumble Company, a national firm engaged in mass appraisal work for the purpose of reassessing real property for local governments. This company did reappraisal work for the Town of Islip several years ago and is currently performing similar work for the County of Nassau. The other three witnesses are experienced and well known appraisal experts. Mr. Albert, in fact, has previously made studies of sales to assessment ratios in other jurisdictions of the state, which is recounted in his testimony. He stated approximately 25% to 30% of the sales examined in his studies were

rejected as ineligible and another 20% could not be verified.

Petitioner produced two statisticians, Louis Primavera and Bernard Gorman, who testified as to the cost of processing the sales data for the purpose of ascertaining the ratio obtained by dividing the total assessments levied against the properties sold in each year by their total sales prices. Mr. Primavera estimated the cost at $158,562, which included expenses attributable to the preparation of the forms to be supplied to the abstractor for transfer of pertinent information to punch cards, key punching, computer time, clerical and printing costs, labor, supervision and consultation fee. Mr. Primavera additionally testified that a random sampling study would not develop a statistically credible ratio because the measure of variability or standard deviation is too great. He explained that a variation between .08 and 1% would be considered large in relation to the number of transactions (sample size of 29,000 per year).

Dr. Gorman's estimate of the cost was $158,462, or essentially the same figure as arrived at by the other statistician. This witness also concluded that a random sampling to obtain a ratio was not feasible but was more explicit, stating that even if none of the 29,000 transactions a year were ineligible, the application of the principle of standard deviation would still necessitate the survey of 23,000 sales. He further stated that if the ineligible sales only represented 30%, the number of sales needed to compensate for this factor would exceed the 29,000 sales that occurred each year. He was therefore of the opinion, in view of the limited size of the samples (29,000), it would be necessary to utilize all sales to compute an accurate ratio to the third decimal point.

A summary of the cost analysis made by these experts for the 10-year period involved in the *Wilmar* pro-

ceeding is set forth in Schedule "A" annexed to this decision, and the translation of these figures to cover the 7 tax years under review in the subject proceeding appears on Schedule "A-1".

The uncontradicted testimony of these witnesses demonstrate a cost ranging from a low of $301,000 to a high of $644,000 a tax year. The petitioner, in this case, who had placed 7 years at issue, would therefore face an expense ranging between $2,100,000 to $4,500,000 to establish ratio by the cost of sales method. The property owned by petitioner is a one-story taxpayer located on a 16,000 square foot plot whose building area of 7,000 square feet has been partitioned to permit occupancy by 7 stores. The rental value of the tenanted space ranged from $5.00 a square foot in 1974 to $8.50 in 1980. The land, during these years, had a value ranging between $92,800 and $163,200. The assessment imposed against the property in each tax year under review was $55,300 which translates to a tax burden of $12,500 on May 1, 1974 to $18,000 for May 1, 1980. The lowest estimate given for the cost of a sales survey for a single year exceeds the net income realized by the taxpayer for all 7 years under review (*see Canigiani v. Board of Assessors of County of Nassau*, Index No. 15394, decision dated April 8, 1981). The highly exorbitant and prohibitive cost of establishing ratio by this method to this taxpayer whose tax refund in a given year could not exceed $10,000, requires no elaboration. The experience of this court in disposing of over 1,500 tax certiorari proceedings indicates the costs precludes use of the remedy by all but perhaps a handful of the most affluent taxpayers in Nassau County.

By constitutional mandate (N.Y.Const. Art. 16, § 2), the right to judicial review of property assessments is bestowed on taxpayers, and the statute (Real Property Tax

Law, Art. 7) implementing this directive has made inequality of assessment a ground for complaint (Real Property Tax Law § 706). The legislature, while retaining this remedy, has effectively abolished the means of obtaining relief by limiting the methods of proving ratio to evidence that is economically oppressive and prohibitive. Due process requires that some reasonably adequate and appropriate remedy be available for the enforcement of the rights conferred on property owners. Protection of due process is denied where the procedure prescribed for establishment of the right of redress is merely a colorable pretense. The legislature need not, of course, provide the most expedient method of relief, but neither may it totally frustrate the remedy. In short, the legislature, under the guise of prescribing rules of evidence, may not prevent a party from exhibiting his rights by virtually excluding all evidence that may be presented (*Board of Commissioners of Excise of City of Auburn v. Merchant*, 103 N. Y. 143, 148; 9 N.Y. Jur. [Constitutional Law] § 347, p.243; 21 N.Y. Jur. [Evidence] § 6, pp. 163-164). The total denial of a remedy effects a deprivation of property to the same extent as though the property had been taken by direct legislative enactment (*Gilman v. Tucker*, 128 N. Y. 190, 202).

The constitutional guaranty of due process demands that a litigant be allowed to introduce probative facts in support of his or her right to relief. Ratio in an inequality case is simply a mathematical calculation. The statistical data necessary to make that calculation is accumulated and processed by the State Board of Equalization and Assessment to support the rate it has promulgated pursuant to the powers invested in it (Real Property Tax Law § 202; *see, also*, N.Y. Const., Art. 5, § 1; Art. 8, § 101. The Court of Appeals has decisively ruled the state equalization rate is ". . . objectively . . . and expertly arrived at . . . .," and

has additionally observed that ". . . while the primary purpose of the state equalization rate may be to facilitate uniform State aid to localities, there is no discernible reason why it also may not be used in individual inequality cases (*Guth Realty, Inc. v. Gingold, supra,* at 450, 451). The state rate has therefore been judicially sanctioned as probative of the facts upon which the mathematical calculation of ratio is based and has, in fact, been recognized as *prima facie* evidence of ratio (*860 Executive Towers v. Board of Assessors of the County of Nassau, supra*). The legislative enactment (Laws 1979, c. 126) abolishing the use of the state rate denies to petitioner the right to present evidence of his claim unless the sample parcel system or actual sales are considered viable alternatives. They are not. Laws 1979, c. 126, therefore, is an unconstitutional deprivation of petitioner's right to present evidence in support of his claim. The effect of an unconstitutional amendment of a statute is to leave the enactment as if no amendment had been attempted (McKinney's Statutes, §§ 196, 377), since an unconstitutional act is inoperative as though it had never been passed (*People ex rel Farrington v. Mensching,* 187 N. Y. 8; *Van Antwerp v. State of New York,* 218 N. Y. 422).

The court, accordingly, finds the prohibition against the use of the state rates an unconstitutional deprivation of this petitioner's right to due process of law and allows their admission into evidence as provided before the passage of Laws 1979, c. 126, § 2. The order of this court vacating its decision is recalled, and upon consideration of the facts presented on this hearing, is reinstated. Settle judgment on notice.

/s/ THOMAS P. FARLEY
J.S.C.

STATUTES

Administrative Code of the City of New York, Vol. 2, ch. 7, Title A, Section 166-1.0

§ 166-1.0 *Proceeding to review tax assessment; contents of petition.*—a. Any person or corporation claiming to be aggrieved by the assessed valuation of real property may commence a proceeding to review or correct on the merits a final determination of the tax commission by serving on the president of the tax commission, or his duly authorized agent, a copy of a verified petition as prescribed by law. . . .

b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

1. That the assessment is illegal, and stating the particulars of the alleged illegality, or

2. That the assessment is erroneous by reason of over-valuation, or

3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby.

Act of December 3, 1981, ch. 1057, §§ 305(2), 706, 707, 1801(a), 1981 N.Y. Laws

§ 305. Assessment methods and standard. . . .

2. All real property in each assessing unit shall be assessed at a uniform percentage of value (fractional

assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section.

§ 706. Contents of petition. 1. This section shall apply in all assessing units other than special assessing units as defined in section eighteen hundred one of this chapter.

2. A proceeding to review an assessment shall be founded upon a petition setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation or misclassification, stating the extent of such overvaluation or the proper classification, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll by the same officers, and stating that the petitioner is or will be injured thereby. Such petition shall be duly verified by the petitioner, an officer thereof, or by an agent thereof who has been authorized in writing to verify and file such petition and whose authorization is made a part of such petition. Such petition must show that a complaint was made in due time to the proper officers to correct such assessment. Two or more persons having real property assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

§ 6. Such law is amended by adding a new section seven hundred seven to read as follows:

§ 707. Contents of petition in special assessing units.

1. This section shall apply to special assessing units as defined in section eighteen hundred one of this chapter.

2. A proceeding to review an assessment shall be founded upon a petition setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation or misclassification, stating the extent of such overvaluation or the proper classification, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property in the same class on the same roll by the same officers, and stating that the petitioner is or will be injured thereby. Such petition shall be duly verified by the petitioner, an officer thereof, or by an agent thereof who has been authorized in writing to verify and file such petition and whose authorization is made a part of such petition. Such petition must show that a complaint was made in due time to the proper officers to correct such assessment. Two or more persons having real property assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

§ 1801. Definitions. (a) "Special assessing unit" means an assessing unit with a population of one million or more.

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

—and—

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the City
of New York
Attorney for Appellees the Finance Administration and Tax Commission of the City of New York
100 Church Street
New York, New York 10007
(212) 566-2691

LEONARD OLARSCH,
GARY SCHULLER,
of Counsel

October 18, 1982

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
THE STATE STATUTE AND THE NATURE OF THE CASE	2
I. The Statute	2
II. Nature of the Case	6
ARGUMENT	7
I. The Order Appealed From Is Not Final	7
II. The Question Presented Is Not Substantial	9
A. Due Process	10
B. Equal Protection	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	PAGE
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936)	9
Colt Industries v. *Tax Commission* (Appendix to Jurisdictional Statement, A1-A9)	6, 9
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	7
860 Executive Towers v. *Board of Assessors of the County of Nassau*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dept. 1976), aff'd *sub nom. Pierre Pellaton Apartments* v. *Board of Assessors of the County of Nassau*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977)	8
Equitable Life Assurance Society v. *Brown*, 187 U.S. 308 (1902)	9
Gibbes v. *Zimmerman*, 290 U.S. 326 (1933)	10
Griffin v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964)	11
Guth Realty v. *Gingold*, 34 N.Y.2d 440, 315 N.E. 2d 441, 358 N.Y.S.2d 367 (1974)	4
Hellerstein v. *Assessor of the Town of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975)	5
Matter of Mid-Island Shopping Plaza v. *Podeyn*, 25 Misc.2d 972, 204 N.Y.S.2d 11 (Sup. Ct., Nassau Co., 1960), aff'd 14 A.D.2d 571, 218 N.Y.S.2d 249 (2d Dept. 1961), aff'd 10 N.Y.2d 966, 180 N.E.2d 63, 224 N.Y.S.2d 283 (1961)	8
Matter of O'Brien v. *Assessor of the Town of Mamaroneck*, 20 N.Y.2d 587, 232 N.E.2d 844, 285 N.Y.S.2d 843 (1967)	4
Matter of Rochester Savings Bank v. *Wagner*, 34 A.D.2d 164, 310 N.Y.S.2d 746 (4th Dept. 1970)	9

PAGE

Matter of Seneca Hotel Corp. v. *Chacchia*, 13 A.D.2d 896, 215 N.Y.S.2d 518 (4th Dept. 1961), aff'd 10 N.Y. 2d 1031, 180 N.E.2d 435, 225 N.Y.S.2d 48 (1962).... 8

McGowan v. *Maryland*, 366 U.S. 420 (1961)..... 11

Missouri v. *Lewis*, 101 U.S. 22 (1879)..... 11

North v. *Russell*, 427 U.S. 328 (1976)..... 11

Palmer Oil Corp. v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952)..... 9

People ex rel. Hagy v. *Lewis*, 280 N.Y. 184, 20 N.E.2d 386 (1939)..... 8

People ex rel. Stewart v. *Feitner*, 53 Misc. 334, 104 N.Y.S. 794 (Sup. Ct., N.Y. Co., 1907) 3

People ex rel. Yaras v. *Kinnaw*, 303 N.Y. 224, 101 N.E. 2d 474 (1951)..... 4

Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62 (1948) 8

Salsburg v. *Maryland*, 346 U.S. 545 (1954) 11

Zucht v. *King*, 260 U.S. 174 (1922)..... 9

Statutes:

28 U.S.C. § 1257 .....1, 7, 9

N.Y.C. Administrative Code § 166-1.0 9

New York Real Property Tax Law § 716..... 8

New York Real Property Tax Law § 720(3).....*passim*

Other Authority:

Fourteenth Amendment of the United States Constitution 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-290

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION
OF THE CITY OF NEW YORK,

—and—

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

Appellees, the Finance Administration and the Tax Commission of the City of New York ("City"), move the Court to dismiss the appeal herein on the grounds: (1) that the order of the New York Court of Appeals is not final pursuant to 28 U.S.C § 1257, and (2) that the appeal does not present a substantial federal question. In the alternative, appellees ask that the order of the New York Court of Appeals be affirmed.

THE STATE STATUTE AND THE NATURE OF THE CASE

I. The Statute

Appellant attacks the constitutionality of New York Real Property Tax Law (RPTL) § 720(3), as added by the New York State Legislature on December 3, 1981. L. 1981, ch. 1057, § 7, McKinney's N.Y. Session Laws 1981, March 1982 Supp. at 1981-233. The statute reads as follows:

> 3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be. Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:
>
> (a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;
>
> (b) in all assessing units other than special assessing units as defined in section eighteen hundred one of this

chapter, the state equalization rate established for the roll containing the assessment under review; or

(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio.

As can be seen, the purpose of RPTL § 720(3) is to regulate the evidence which can be introduced on the issue of the general ratio of assessed value to full value in real property tax review proceedings grounded on a claim of inequality. A brief history of the statute's predecessors is helpful to its understanding.

Since 1880, New York has permitted judicial review of real property tax assessments on grounds of illegality, overvaluation, or inequality. L. 1880, ch. 269. An inequality proceeding involves a two-step process: proof of the average ratio of assessed value to full value in the tax district and proof of the value of the taxpayer's property. The ratio is applied to the value of the property to determine whether the owner's assessment, even though not an overvaluation, nevertheless is at a greater percentage of full value than that generally prevailing in the district.

The traditional means of proving ratio was to compare the assessed values of a sample of other properties in the taxing district with their actual values as established by appraisals. However, it appears that in some cases the amount of proof offered grew to inordinate proportions. Cf. *People ex. rel. Stewart* v. *Feitner*, 53 Misc. 334, 104 N.Y.S. 794 (Sup. Ct., N.Y. Co., 1907). Thus, in 1911 the Legislature amended former

N.Y. Tax Law § 293 (predecessor of RPTL § 720(3)) to permit the court to select the parcels to be utilized in determining ratio if the parties could not agree on a representative sampling. L. 1911, ch. 302, § 1. In 1920 the Legislature again amended the statute to provide that a comparison of sales prices to assessed values could also be used in establishing ratio as an adjunct to the sample parcel approach. L. 1920, ch. 643.

In 1951, a taxpayer attempted to introduce the equalization rate established by the State Board of Equalization and Assessment (SBEA) as evidence of ratio in an inequality review proceeding, but the rate was held to be inadmissible. *People ex. rel. Yaras* v. *Kinnaw*, 303 N.Y. 224, 101 N.E. 2d 474 (1951). The SBEA rate is established annually for each of the taxing jurisdictions in the State pursuant to N.Y. Real Property Tax Law, Art. 12, and purports to measure the average ratio of assessed value to full value in the district. The primary function of the rate is to compute the state constitutional tax and debt limits of the various municipalities in New York and to equalize state aid to localities.

In 1961, RPTL § 720(3) was amended to permit introduction of the SBEA rate but, as with sales, it was only allowed as an adjunct to the sample parcel approach. L. 1961, ch. 942. An attempt to use the rate by itself failed in *Matter of O'Brien* v. *Assessor of the Town of Mamaroneck*, 20 N.Y. 2d 587, 232 N.E. 2d 844, 285 N.Y.S. 2d 843 (1967). By virtue of a 1969 amendment to the statute, the SBEA rate, as well as sales proof, was permitted to be introduced, "whether or not" the sample parcel method was employed. L. 1969, ch. 302; see, e.g., *Guth Realty* v. *Gingold*, 34 N.Y. 2d 440, 315 N.E. 2d 441, 358 N.Y.S. 2d 367 (1974).

In 1979, the Legislature became convinced that use of the SBEA rate in property tax proceedings was producing invalid results. Enacting an amendment to RPTL § 720(3) precluding its use as evidence of ratio the Legislature stated (L. 1979, ch. 126, § 1):

> Section 1. The legislature hereby finds and determines, after carefully evaluating the impact of the provisions of subdivision three of section seven hundred twenty of the real property tax law in relation to permitting the use of the state equalization rate established for the roll in proceedings to review real property assessments, that such provisions are not capable of valid application to assessments of business and commercial properties as well as residential properties in the particular assessing unit. Moreover, in many instances the use of such equalization rate has not proven to be valid even in connection with the same types of property and has often resulted in undesirable and unintended results.
>
> The legislature further finds that the reason such equalization rate is inappropriate and invalid is that the equalization rate established for the roll was never intended to determine property values for taxing purposes but was intended only to be used in connection with equalizing state aid and to compute constitutional tax and debt limits. Therefore, the use of such equalization rate for the purpose of quantifying the ratio of assessment to market value within a taxing district produces spurious and counter-productive results.
>
> In view of the foregoing, . . . the legislature hereby determines that the within provisions of this chapter should be enacted and that for all causes and purposes such provisions shall be deemed and construed as remedial in nature.

This ban on the use of the SBEA rate was continued by L. 1981, ch. 3; L. 1981, ch. 107; and L. 1981, ch. 259, as part of a general review of the State's real property tax system in the wake of the decision in *Hellerstein* v. *Assessor of the Town of Islip*, 37 N.Y. 2d 1, 332 N.E. 2d 279, 371 N.Y.S. 2d 388 (1975). Finally, on December 3, 1981, a comprehensive new tax statute was enacted, in which former RPTL § 720(3) was repealed and current RPTL § 720(3) was enacted. It is this legislation, which

permits use of the SBEA rate except in special assessing units, that appellant here challenges.*

II. Nature of the Case

Appellant commenced property tax review proceedings with respect to two parcels of property it owns in New York City for tax years 1972/73—1979/80. In its petitions, appellant alleged that the assessments on these properties had been fixed at a higher proportionate valuation than the assessment of other properties in New York City.

In June, 1980, Justice Mangan of the New York Supreme Court held in *Colt Industries* v. *Tax Commission* that the 1979 ban on use of the SBEA rate precluded its introduction in tax review proceedings tried after its effective date (App., A20-A31).** Thereafter, appellant moved for an order which, in essence, sought to bar the City from relying on *Colt* when appellant's petitions were to be tried. In appellant's view, the SBEA rate should be conclusive and binding on the issue of ratio (Appellant's Court of Appeals Br. pp. 1, 63). This motion was denied, and this case and *Colt* were appealed and argued together in the Appellate Division of the New York Supreme Court.

The Appellate Division affirmed the orders appealed from, one Justice dissenting (App., A50-A57). That Court then granted both appellant and Colt leave to appeal to the New York Court of Appeals from its orders of affirmance.

The cases were argued in the Court of Appeals on November 18, 1981. The statute as enacted when the case was in the lower courts had expired on October 30, but new RPTL § 720(3) had

---

* A special assessing unit is defined by RPTL § 1801(a) as "an assessing unit with a population of one million or more." At present, New York City and Nassau County are the only special assessing units in the State.

** Appendix references are to the Appendix to the Jurisdictional Statement. Page references to the statement itself will be preceded by "J.S.".

been passed by the Legislature shortly before in late October. However, the bill of which this was a part was vetoed by the Governor on November 11, 1981. On December 3, 1981 the Legislature overrode the Governor's veto, and current RPTL § 720(3) became law. The Court of Appeals thereupon agreed to accept supplemental, post-argument briefs addressed to the constitutionality of RPTL § 720(3) as presently constituted. On January 7, 1982, the Court of Appeals issued its unanimous opinion upholding the statute (App., A1-A9).

ARGUMENT

I. The Order Appealed From Is Not Final

The order of the New York Court of Appeals is not a final judgment or decree, as required by 28 U.S.C. § 1257. The Court's order merely ruled on a procedural issue concerning what evidence may be introduced on the issue of ratio pursuant to the state statute governing property tax assessment review proceedings. The entire tax review proceeding remains to be tried, including questions concerning the ratio at which property in the City has been assessed and the values of appellant's properties.

Appellant's claim of finality rests on the assertion that "the federal issue presented herein is conclusive of the outcome of the case" (J.S. 20), citing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). That is not the case. Appellant retains both the sales and sample parcel modes of proof by which it can establish ratio. These methods, the established means of proving ratio for over 50 years, afford appellant a meaningful opportunity to attempt to establish unequal treatment. As the Court of Appeals recognized, the Legislature did "no more than restore, in special assessing units, the *status quo ante* chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates" (App., A8). Indeed, on analysis it is clear that it went even further, since in 1961 sample parcel proof was mandatory with sales only usable as

an adjunct. Now, however, sales can be used on their own, without resort to the sample parcel proof that appellant finds so objectionable.

The challenge here is clearly limited to the facial validity of RPTL § 720(3). Appellant has never attempted to establish ratio by either of the permissible methods, or to show its absence of financial ability to do so, other than by the submission of a self-serving affidavit (App., A47-A49) that was never subject to challenge given the procedural posture of this case. Thus, it cannot be heard to argue that application of RPTL § 720(3) in this proceeding violates its constitutional rights, an issue that remains to be tested. Moreover, even if that were relevant, it is clear that the mere assertion of added cost in establishing a claim is insufficient to confer the aura of finality on an interlocutory order that is deemed sufficient to create jurisdiction under 28 U.S.C. § 1257. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

Additionally, appellant omits reference to RPTL § 716, which permits a taxpayer in New York State to serve a demand on the taxing district that it admit the prevailing level of assessment. If the district fails to do so and the taxpayer successfully establishes a lower ratio, the entire cost of proof on this issue is shifted to the municipality. This is what happened in *860 Executive Towers* v. *Board of Assessors of the County of Nassau*, 53 A.D. 2d 463, 385 N.Y.S. 2d 604 (2d Dept. 1976), aff'd *sub nom., Pierre Pellaton Apartments* v. *Board of Assessors of the County of Nassau*, 43 N.Y. 2d 769, 372 N.E. 2d 801, 401 N.Y.S. 2d 1013 (1977), the case on which appellant heavily relies (see, e.g., J.S. 12-13). Also overlooked by appellant are the many cases in which sales and sample parcel proof have been used in inequality proceedings in New York. See *People ex rel. Hagy* v. *Lewis*, 280 N.Y. 184, 20 N.E.2d 386 (1939); *Matter of Mid-Island Shopping Plaza* v. *Podeyn*, 25 Misc. 2d 972, 204 N.Y.S. 2d 11 (Sup. Ct., Nassau Co., 1960), aff'd 14 A.D. 2d 571, 218 N.Y.S. 2d 249 (2d Dept. 1961), aff'd 10 N.Y. 2d 966, 180 N.E. 2d 63, 224 N.Y.S. 2d 283 (1961); *Matter of Seneca Hotel Corp.* v. *Chacchia*, 13 A.D. 2d

896, 215 N.Y.S.2d 518 (4th Dept. 1961), aff'd 10 N.Y.2d 1031, 180 N.E.2d 435, 225 N.Y.S.2d 48 (1962); *Matter of Rochester Savings Bank* v. *Wagner*, 34 A.D. 2d 164, 310 N.Y.S. 2d 746 (4th Dept. 1970). Also, N.Y.C. Administrative Code § 166-1.0 permits a sectional approach to inequality rather than measuring it on a citywide basis (see *Colt, supra*, App., A2-A3), thereby limiting the quantum of proof, and concomitantly the expense of proof, on the ratio issue. These considerations simply destroy appellant's assertion that financial constraints are such as to render any proof of ratio impossible and thereby preordain the result on remand.

As this Court has repeatedly emphasized, treating interlocutory orders as final for § 1257 purposes is something that should be done only in rare circumstances. Otherwise, the policy considerations underlying the requirement of finality—which include avoidance of unnecessary constitutional adjudications—would be undermined. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J. concurring). In these proceedings, appellant continues to have available the traditional sales and sample parcel methods of proving the generally prevailing ratio of assessed value to full value. The order of the New York Court of Appeals is not conclusive of the outcome of this case, as claimed by appellant, and therefore is not final within the meaning of 28 U.S.C. § 1257.

II. The Question Presented Is Not Substantial

It is settled that where prior decisions of this Court are so clearly dispositive of the issues that no room is left for good faith argument, the federal question is not substantial and this Court has no jurisdiction over the matter. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308 (1902); *Zucht* v. *King*, 260 U.S. 174 (1922); *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952). Here, prior decisions, relied on by the New York Court of Appeals, plainly demonstrate that neither the due process nor equal protection claims of appellant is of any merit, thus removing the order from this Court's jurisdiction.

A. Due Process

The due process clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." Appellant here claims a property right to use of the SBEA equalization rate as evidence of ratio in state tax review proceedings, and contends that RPTL § 720(3), in denying use of the rate, violates due process.

It is beyond question, however, that no person has a property right in any particular form of remedy or rule of evidence. *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933). As the Court said in *Gibbes*, "all that [a person] is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure (citing cases)." *Id.*, at 332. Unquestionably, appellant has not been denied its right to secure judicial review of its property tax assessments by RPTL § 720(3). As noted earlier (*supra*, pp. 7-8), it continues to have available the sales and sample parcel methods of proof by which to establish the general ratio of assessment in the City and against which its assessments can be measured. These traditional means of proof, which have been used by taxpayers in New York State (see cases cited *supra*, pp. 8-9), provide appellant an effective means of redress for what it believes are unequal assessments.

Because the right to judicial review remains unaffected by RPTL § 720(3) and only an evidentiary rule is challenged, no property right of appellant is at issue. Consequently, the due process claim advanced is not substantial.

B. Equal Protection

Appellant also challenges RPTL § 720(3) because it permits use of the SBEA rate as evidence in all but special assessing units. In appellant's view, this causes the statute to violate the equal protection clause.

It is firmly established, however, that states possess wide latitude in fashioning rules of evidence for use in their courts,

and that territorial uniformity is not required by the equal protection clause. *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *North* v. *Russell*, 427 U.S. 328 (1976). Indeed, the lack of any requirement that all areas of a state be treated alike is not open to question. See *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964). "The Equal Protection Clause relates to equality between persons as such rather than between areas." *Salsburg, supra*, at 551. As this Court stated many years ago in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879):

> If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws.

RPTL § 720(3) satisfies the requirements of equal protection. It applies equally to all taxpayers in special assessing units, and equally to all taxpayers in other assessing units. Just as appellant has no constitutional right in continuance of the SBEA or its rate, which could be abandoned by the State Legislature in favor of other means of apportioning state aid to localities, appellant had no right to continued availability of the SBEA rate as evidence of ratio in tax proceedings. As the Court of Appeals held (App., A7):

> The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y. 2d 1, 371 N.Y.S. 2d 388, 332 N.E. 2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property.

Accordingly, because prior decisions of this Court make plain that appellant's equal protection claim is wholly without merit, it, too, fails to present a substantial federal question.

CONCLUSION

The City's motion to dismiss this appeal should be granted or, in the alternative, the order of the New York Court of Appeals should be affirmed.

Dated: October 18, 1982

Respectfully submitted,

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the City
of New York
Attorney for Appellees the Finance Administration and Tax Commission of the City of New York
100 Church Street
New York, New York 10007
(212) 566-2691

LEONARD OLARSCH,
GARY SCHULLER,
of Counsel

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,

No. 82-398

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

against

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

On Appeal from the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
Appellee Pro Se
Two World Trade Center
New York, New York 10047
(212) 488-3443

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JOHN M. FARRAR
Assistant Attorney General

Of Counsel

TABLE OF CONTENTS

	PAGE
Statement of the Case	2
A. Background	2
B. The State Equalization Ratio as Evidence	4
C. Legislation and Litigation	5
D. The Opinion Below	8
Argument	
The judgment below is not final; nor does the instant case present an exception to the finality rule. No substantial federal question is presented	10
A. The judgment below is not final	10
B. No important considerations of federal policy warranting the treatment of the judgment as final are presented	14
C. No substantial federal question is presented	15
Conclusion	17

TABLE OF AUTHORITIES

PAGE

Cases:

Board of Education, Levittown Union School Free District v. Nyquist, —— N.Y.2d —— (Slip op. No. 317, June 23, 1982) 16
Brown Shoe Co. v. United States, 370 U.S. 294 (1961) 15

Canigiani, Matter of v. Board of Assessors, Nassau County (Sup. Ct. Nassau Co., Slip op. June 29, 1981; N.Y.L.J., July 9, 1981 p. 13 Col. 2 12
Catlin v. United States, 324 U.S. 215 (1945) 11
Central Vermont Railway Co. v. White, 238 U.S. 513 (1915) 14, 15
Colt Industries, Inc., Matter of v. Finance Administrator of the City of New York, 54 N.Y.2d 533, 446 N.Y.S.2d 237 (1982) 8–10
Colt Industries, Inc., Matter of v. Finance Administrator of the City of New York, 81 A.D.2d 777, 439 N.Y.S.2d 385 (1st Dept. 1981) 7
Colt Industries, Inc., Matter of v. Tax Commission of the City of New York (Sup. Ct. N.Y. Co., Slip op. June 12, 1980) 6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 12, 14
Crane v. Hahlo, 258 U.S. 142 (1922) 16

Ed Guth Realty Inc., Matter of v. Gingold, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974) 4
860 Executive Towers, Inc., Matter of v. Board of Assessors, Nassau County, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dept. 1976) 4, 5

Fisher v. District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382 (1976) 14
Funkhouser v. J.B. Preston Co., 290 U.S. 163 (1933) 16

PAGE

Gibbs v. Zimmerman, 290 U.S. 326 (1933) 9
Grays Harbor Logging Company v. Coates-Fordney Logging Company, 243 U.S. 251 (1917) 11, 12
Greenough v. Tax Assessors of Newport, 331 U.S. 486 (1947) 15

Hellerstein, Matter of v. Assessor of Town of Islip, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E.2d 279 (1975) 9

J.A. Green Construction Corp., Matter of v. Finance Administrator of the City of New York, 56 N.Y.2d 369 (1982) 16

Louisville and Nashville Railroad Co. v. Melton, 218 U.S. 36 (1910) 16

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 17
Minnick v. California Department of Corrections, —— U.S. ——, 101 S.Ct. 2211 (1981) 11, 13, 16
Missouri v. Lewis, 101 U.S. 22 (1879) 9
Mobile, J & K.C. R.R. Co. v. Turnipseed, 219 U.S. 34 (1910) 16

North Dakota State Board of Pharmacy v. Snyders Drug Stores, Inc., 414 U.S. 156 (1973) 15

Pierre Pellaton Apts. Inc., Matter of v. Board of Assessors, Nassau County, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977) 4
Pope v. Atlantic Coast Line Railroad Co., 345 U.S. 379 (1953) 14

Radio Station WOW v. Johnson, 326 U.S. 120 (1944) 15
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 11, 13, 14, 17

PAGE

Salsburg v. Maryland, 346 U.S. 545 (1954) 9, 16
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 16
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1980) 11, 12, 16
Slewett and Farber, Matter of v. Board of Assessors, Nassau County, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982) 3
Slewett and Farber, Matter of v. Board of Assessors, Nassau County, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dept. 1981) 7
Slewett and Farber, Matter of v. Board of Assessors, Nassau County, 78 A.D.2d 403, 435 N.Y.S.2d 313 (2d Dept. 1981) 7
Slewett and Farber, Matter of v. Board of Assessors, Nassau County, 97 M.2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau Co. 1978) 6
Standard Brands, Inc., Matter of v. Walsh, 92 M.2d 903, 402 N.Y.S.2d 264 (Sup. Ct. Westch. Co. 1977) 12, 13
State ex rel. Van Emmerick v. Janklow, 300 N.W.2d 700 (Sup. Ct. S.D. 1981) *app. dism.* —— U.S. ——, 102 S.Ct. 986 (1982) 15, 16
Swanz, Matter of v. Brandt, 52 A.D.2d 1071, 384 N.Y.S.2d 331 (4th Dept. 1976) 12

Wainwright v. Sykes, 433 U.S. 72 (1977) 13

Constitutional Provisions:

United States Constitution Amendment XIV, § 1 ..... *passim*

PAGE

Statutes:

United States Code:

28 U.S.C. § 1257(2) 2

New York Real Property Tax Law:

§ 305.2 (McKinneys Session Laws, Mar 1982 Supplement, L. 1981 Ch. 1057 ¶ 7) 3
§ 307 (49A McKinneys Cum. Supp. 1981-82) 5
§ 716 (49A McKinneys) 13, 17
§ 720.1 (49A McKinneys) 3
§ 720.3 (various sources) ..... *passim*

Administrative Code of the City of New York:

§ 166-1.0 (Vol. 2, Ch. 7, Title A) 3, 6, 8, 10, 11

Session Laws: (McKinneys)

L. 1981 Ch. 1057 § 7 (Mar. 1982 Supp.) 1, 7, 8
L. 1979 Ch. 126, 127 ..... 6, 7
L. 1978 Ch. 476 ..... 5, 7
L. 1969 Ch. 302 4
L. 1961 Ch. 942 ..... 4, 10

Rules:

Rules of the United States Supreme Court:

Rule 16 1

No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

against

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

On Appeal from the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

Appellee ROBERT ABRAMS, Attorney General of the State of New York, moves under Rule 16.1(a), (b) and (c) of the Rules of the Supreme Court to dismiss the appeal of appellant, the Equitable Life Assurance Society of the United States ("Equitable") from the judgment of the New York Court of Appeals which held § 720.3 of the Real Property Tax Law of the State of New York (L. 1981 Ch. 1057 § 7) not to violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution, nor, on its face, to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, appellee Abrams moves to affirm that judgment.

The statute, real Property Tax Law (R.P.T.L.) § 720.3, upheld below to the extent indicated and held prospectively applicable to appellant on remand for trial in appellant's tax certiorari proceeding on the theory of inequality of assessment, limits evidence of the ratio of assessed to full value of real property in the City of New York to that obtained from appraised sample parcels and actual sales. Use of the state equalization ratio, compiled by the New York State Board of Equilization and Assessment, as such proof, is foreclosed (A 5).*

The grounds for the instant application are that jurisdiction under 28 U.S.C. § 1257(2) is improperly invoked as the judgment below is neither final nor presents a substantial federal question; or that if jurisdiction is properly invoked it is manifest that the precedents of this Court on which the decision below rests are so well established as to render further argument unnecessary.

Statement of the Case

A. Background

Appellant has challenged its local real property assessment on the ground of inequality. A challenge to an assessment of a local assessing district in the State of New York

* Parenthesized page references preceded by an "A" refer to appellant's appendix; those preceded by a "JS" refer to appellant's jurisdictional statement.

on the ground of inequality presupposes that real property in the assessing district is assessed at less than full value.* The petitioner in an inequality proceeding argues that his parcel has been assessed at a higher "ratio" (*i.e.*, fraction) of full value than the other property in the district with which he seeks to compare it and that the assessment should be accordingly reduced and his payment of local real property taxes proportionally refunded. Such a tax review proceeding is bifurcated, the first part establishing the applicable ratio of assessment and the second determining the fair market value of the property in question against which the ratio is applied to determine whether the assessment is unequal. *Matter of Slewett and Farber* v. *Board of Assessors, Nassau County*, 54 N.Y.2d 547, 555, 446 N.Y.S. 2d 241, 243, 430 N.E.2d 1294, 1296 (1982).

The ratio or fraction of "other" parcels, with which the fractional assessment of the parcel under judicial review in an inequality proceeding is to be compared under the Real Property Tax Law was construed as an average ratio encompassing all types of property in the district, not the class of property to which the subject parcel belonged. However, unlike the Real Property Tax Law, the New York City Administrative Code, § 166-1.0.b.3, additionally permits inequality comparison with "like character" properties in the same ward or section. This was the type of inequality review sought by appellant below (*e.g.*, Haims affidavit, A 48). Moreover, the City of New York has also

* See New York Real Property Tax Law § 720.1; New York City Administrative Code § 166-1.0.b.3. Thus, the question of illegality of the practice of fractional assessment is not relevant in a challenge to an assessment on the ground of inequality (A 2-3). Moreover, Real Property Tax Law (R.P.T.L.) § 305.2 now permits fractional assessment (A 7).

assessed "income" property at a higher fraction or ratio than residential property (A 25) for the reason that the income owner may pass along the cost of these taxes while the residential owner cannot.

B. The State Equalization Ratio as Evidence

Prior to 1961, the state equalization ratio (state rate), a "generic" or "whole roll" ratio based upon a sampling of all types of property in a taxing district, was held to be completely inadmissible as evidence of ratio under Real Property Tax Law § 720.3 and its predecessors; the only admissible evidence of ratio being appraised selected parcels supplemented by parcels sold within the district during the period under review. In 1961, the Legislature amended § 720.3 to permit, additionally, proof of actual sales and the state rate (L. 1961 Ch. 942). The 1961 statute was construed as not permitting the state rate as the sole proof of ratio. Then, in 1969, the Legislature amended § 720.3 again (L. 1969 Ch. 302), to permit the use of the state rate as the sole basis for determining the ratio of assessed to full value of property in the district under the Real Property Tax Law; subject, however, to demonstration by petitioner that its use was justified and to challenge by the municipality as to its appropriateness to the parcel under review, the roll under review or the type of property under review. *Matter of Ed Guth Realty, Inc.* v. *Gingold*, 34 N.Y.2d 440, 447-449, 358 N.Y.S.2d 367, 371-372 (1974).

In 1977 the New York Court of Appeals *sub nom. Pierre Pellaton Apts. Inc.* v. *Board of Assessors, Nassau County*, 43 N.Y.2d 769, 401 N.Y.S.2d 1013, 372 N.E.2d 801, affirmed the holding of *860 Executive Towers, Inc.* v. *Board of*

Assessors, Nassau County, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2nd Dept. 1976), that, *inter alia*, the reference in the *Guth* case to the possibility of showing the inappropriateness of the state rate to a particular type of property was largely illusory. Further, the state rate for the year and district in question, once having been litigated, was entitled to collateral estoppel effect.

In consequence of the foregoing, "income" property owners such as appellant, who had failed to prosecute their petitions for review for years as far back as 1969, subsequently consolidated these unprosecuted accumulated petitioners and noticed them for trial on the ground of inequality, flooding the courts with certiorari litigation in which they claimed a virtually conclusive presumption of inequality by applying the "generic" state rate to their income property, which had been assessed as a class by many localities at a higher fraction. Moreover, the automatic application of the state rate, once litigated, threatened units such as Nassau County and the City of New York (if the R.P.T.L. was applicable) with sudden exposure to the refund of billions of dollars in real property tax refunds,* and a concomitant tax shift imposing an additional burden on residential owners therein.

C. Legislation and Litigation

In 1978 the Legislature enacted a statute (L. 1978 Ch. 476; R.P.T.L. § 307) which was construed to retroactively mandate the pleading of inequality by class, and, as such,

* In the City of New York this exposure was reported at 1.7 to 2.7 billion dollars.

was found to be illegal. See *Matter of Slewett and Farber v. Board of Assessors, Nassau County*, 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau Co. 1978).

On May 24, 1979, while appeal from said decision was pending, L. 1979 Ch. 126 and 127 became effective. The 1979 enactment, in pertinent part, amended R.P.T.L. § 720.3 by eliminating the state rate as evidence of ratio in all proceedings then pending and not finally determined. Five months thereafter, on November 2, 1979, Equitable filed its notice of intent to proceed to trial with the City of New York on the ground of inequality as to its Madison Avenue property; and nine months thereafter, on February 27, 1980, it filed a similar notice as to its Fifth Avenue property.

On June 12, 1980, Supreme Court, Special Term, New York County (*Mangan, J.*) rendered its opinion in a case involving similar issues to Equitable's, *Colt Industries, Inc. v. The Tax Commission of the City of New York* (A 20-31). Petitioners there had moved to dismiss the City's defense based on the 1979 enactment barring use of the state rate as evidence of ratio. Noting the unique nature of the City of New York and its mix of real property (A 29-30), the holding was that § 166-1.0.b.3 of the City Administrative Code authorized classified assessment (A 2), thereby rendering irrelevant the use of the generic state rate as proof of ratio (A 25-29); but that in any event petitioner had no vested right to the rule of evidence altered by the 1979 amendment (A 30).

On August 7, 1980, the same court denied Equitable's similar application (A 12-19).

While the Equitable appeal was pending, the Appellate Division, Second Department, on January 21, 1981, rendered an opinion in the *Slewett and Farber* case, affirming that the 1978 pleading statute was in pertinent part unconstitutional, but not reaching the question of the constitutionality of the 1979 amendment to § 720.3 (78 A.D.2d 403, 435 N.Y.S.2d 313, 2nd Dept. 1981).

On reargument however, the Appellate Division, Second Department (80 A.D.2d 186, 438 N.Y.S.2d 544; April 8, 1981), upheld the constitutionality of the 1979 amendment to § 720.3 as a procedural statute designed to control evidence, but held it not applicable to petitioner there, who had obtained an adjudication of ratio prior to its enactment (80 A.D.2d 217, 438 N.Y.S.2d 566).

On May 12, 1981, the Appellate Division, First Department, in the jointly argued appeals of Equitable and Colt Industries, affirmed, on the opinion below, Special Term's construction of the New York City Administrative Code provision as authorizing classified assessment; one Justice partially dissenting (81 A.D.2d 777, A 50-57, A 10-11).

On October 30, 1981, while appeals in all these cases were pending in the New York Court of Appeals, and after briefing on the 1978 and 1979 legislation had been completed, both statutes expired. On December 3, 1981, the Legislature overrode the Governor's veto of new comprehensive legislation, enacting L. 1981 Ch. 1057. This enactment included a new Real Property Tax Law § 720.3, limiting the use of the state rate as evidence of ratio to all assessing units other than Special Assessing Units. It had the effect of

foreclosing the use of the state rate as evidence of ratio in inequality proceedings in New York City and Nassau County (A 5).

D. The Opinion Below

In its opinion, rendered January 7, 1982, after concluding that § 166-1.0 of the Administrative Code was procedural in nature and did not authorize classified assessments in the City of New York (A 2), the New York Court of Appeals held:

> "That this section authorizes taxpayers who challenge the assessments of their real property to present proof of inequality based on either or both of two theories—that the particular assessment 'has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section', or that the assessment 'has been made at a higher proportionate valuation than the assessment of * * * other real property on the assessment rolls of the city for the same year.' Thus, proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the citywide assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof." (A 3).

On the question of evidence, the Court held the 1981 law prospectively applicable to the instant proceeding "in which no evidentiary hearings have yet been held or interlocutory determinations made . . ." (A 5), and directed that

> "Accordingly, when such evidentiary hearings are held in these cases on remittal following this appeal,

among other considerations to be taken into account in rulings with respect to the admissibility of evidence will be the provisions of new subdivision 3 of section 720." (A 5).

Citing this Court's decision in *Salsburg* v. *Maryland*, 346 U.S. 545 (1954), and quoting directly from this Court's opinion in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879), the Court below rejected appellant's Equal Protection challenge (A 6), concluding that:

> "The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein* v. *Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E. 2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property." (A 7).

As to appellant's allegations that the cost of proving ratio by the remaining methods of proof amounted to deprivation of any evidence of ratio in violation of the Due Process Clause, the Court of Appeals held:

> "... it cannot be said that this legislation has been shown, on its face, to constitute such a deprivation. The fact that these procedures are admittedly more cumbersome and expensive does not require a holding that there is a deprivation of due process. (Gibbs v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342.) The Legislature, in its wisdom, has seen fit to restrict the admissible proof to selected parcels and sales data and there are no grounds for this court, by judicial fiat,

to authorize additional proof. The Legislature did no more than restore, in special assessing units, the status quo ante chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates." (A 8).

After the court below denied Equitable's motion to reargue (A 32), Equitable appealed to this Court, claiming that the denial to it of the use of the state rate as evidence of ratio on remand of the case amounts to a denial of Due Process and Equal Protection of the law.

ARGUMENT

The judgment below is not final; nor does the instant case present an exception to the finality rule. No substantial federal question is presented.

A. The judgment below is not final.

As evidenced by the record (Haims affidavit; A 48-49), the original basis of Equitable's challenge to the local assessments in question was comparison with like character properties in the same ward or section. See Administrative Code § 166-1.0.b.3. Whether or not the like character comparison was the result of Special Term's prior holding in *Colt* (JS 14, A 26-27), it cannot be disputed that the New York Court of Appeals actually permitted the expansion of the scope of appellant's remedy on remand beyond that which appellant had specifically asserted at the outset of this litigation when it held that:

> "... proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the city-wide

assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof." (A 3).

Consequently, to assert, as appellants have, that the Court of Appeals' construction of Administrative Code § 166-1.0.b.3 is irrelevant to considerations of finality relating to this appeal (JS 9), and that the instant challenge to that Court's constitutional findings is supported by this record at this time, defies credulity.

The judgment below is not final. There has been no evidentiary hearing on, or adjudication of, ratio (A 5). Even if there had been, the analogy to the line of condemnation and related cases involving interlocutory determinations in which this Court refused jurisdiction is inescapable. See *Grays Harbor Logging Company* v. *Coates-Fordney Logging Company*, 243 U.S. 251 (1917); *Catlin* v. *United States*, 324 U.S. 215 (1945) (orders of condemnation not final—further federal questions may arise on remand); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948) (state commission order to connect to another pipeline and take gas on terms to be agreed upon or fixed by Commission, not final); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1980) (state court determined monetary compensation not appropriate remedy and remanded for hearing on whether taking occurred and what remedies applicable in that event, not final). Compare, *Minnick* v. *California Department of Corrections*, —— U.S. ——, 101 S.Ct. 2211 (1981) (finality found lacking in discrimination case because ambiguity required review by state courts in light of recent case law).

Moreover, the Court of Appeals' holding below on the 'cost of proof' issue was that the new § 720.3 had not been demonstrated "on its face" to constitute a deprivation of Due Process (A 8). Nothing was said concerning the statute's constitutionality *as applied.** Consequently, a constitutional issue remains which has not been finally determined in state courts and might require review by this Court at a later date, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975); *Grays Harbor Logging Company* v. *Coats-Fordney Logging Company, supra; San Diego Gas & Electric Co.* v. *City of San Diego, supra.*

Clearly, reversal of the state court on the federal issues decided in the circumstances at bar would *not* be preclusive of any further litigation on the relevant cause of action and *would* merely control the nature and character of, and determine the admissibility of, evidence in the state court proceedings still to come. *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. 482-483.

In an attempt to persuade this Court to forego consideration of the serious jurisdictional issues related to finality presented by the record, appellant here asserts that "as a practical matter" other methods of proof of ratio are prohibitively expensive (JS 11-12). However, surveys of actual sales have been used as the sole proof of ratio without challenge to their cost, and state courts have held this method of proof of ratio to be more probative than the state rate. See *Matter of Swanz* v. *Brant,* 52 A.D.2d 1071, 384 N.Y.S.2d 331 (4th Dept. 1976); *Matter of Standard*

* The decision of *Canigiani* v. *Board of Assessors, Nassau County* (Sup. Ct. Nassau Co., Slip op. June 29, 1981; A 58-69) is presently pending on appeal to the Appellate Division, Second Department.

Brands, Inc. v. *Walsh*, 92 M.2d 903, 402 N.Y.S.2d 264 (Sup. Ct. Westch. Co., 1977). The methods of proof and theories to be employed—indeed, even the decision to initiate certiorari litigation—by "income" property owners, would therefore appear to be a matter of business judgment rather than of constitutional law.

Surely, appellant cannot bootstrap itself into this Court's jurisdiction at this time by such an unsupported unilateral denunciation and renunciation of alternate theories of inequality and methods of proof of ratio made available under the statute in question, which, in part, appellant has heretofore espoused. *Minnick* v. *California Department of Corrections, supra*, —— U.S. ——, 101 S.Ct. 2211, 2219-2220 (1981). Compare, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Moreover, Real Property Tax Law § 716 provides for reimbursement of expenses incurred in proving ratio. Real Property Tax Law § 716 has never been directly placed in issue in any of the proceedings below.

As this Court stated in *Republic Gas Co.* v. *Oklahoma, supra*:

> "The incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention. But even if the Commission's order were construed to require Republic to take and dispose of Peerless' gas immediately—and we are not so advised by the State court—there is no ground for assuming that any loss that Republic might incur could not be recovered should the completed direction of the Oklahoma Commission, on af-

firmance by that State's Supreme Court, ultimately be found to be unconstitutional. Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." (334 U.S. 70-71; citations omitted).

The instant record, we submit, hardly supports the examination by this Court at this time of the decision below, relying as it does on precedent established by this Court over 100 years ago.

B. No important considerations of federal policy warranting the treatment of the judgment as final are presented.

None of the exceptions to the finality rule set forth in *Cox Broadcasting Co.* v. *Cohn, supra,* has been demonstrated to be applicable to the instant appeal. The case at bar does not involve the question of a state court exceeding its jurisdiction where it is preempted by a federal law or policy. See *Fisher* v. *District Court of the Sixteenth Judicial District of Montana,* 424 U.S. 382 (1976) (conflict of State court with Indian Tribal court); *Pope* v. *Atlantic Coast Line Railroad Co.,* 345 U.S. 379 (1953) (injunction by court of one state of F.E.L.A. action in another state); *Central Vermont Railway Company* v. *White,* 238 U.S. 513 (1915) (application of state statute of limitation in F.E.L.A. case).

It is not a case where the constitutional issue could not be preserved on remand, *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973), or where no federal question could be raised in a subsequent proceeding, *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1944), or where only ministerial or *pro forma* proceedings remain to be completed, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1961).

Rather, it is a case where a state court has construed a state statute relating to a matter of state and local concern as procedural, and applied it prospectively to a stage of a pending proceeding which has not been reached; a construction usually binding on this Court, *Greenough* v. *Tax Assessors of Newport*, 331 U.S. 486, 489 (1947); *Central Vermont Railway Co.* v. *White*, *supra*, 238 U.S. 507, 513.

Consequently, the instant circumstances do not warrant making an exception to the finality rule.

C. No substantial federal question is presented.

What Equitable here seeks is to have this Court hold as substantive a state statute which the highest state court has held to be procedural.

However, even in the case of a substantive statute ratifying assertedly illegal collections of sales taxes, thereby avoiding the severe economic impact of the necessity of refunding millions of dollars in past taxes paid, *State ex rel. Van Emmerick* v. *Janklow*, 300 N.W. 2d 700 (Sup. Ct. S.D. 1981), this Court has dismissed an appeal from the highest state court's ruling upholding constitutionality for

lack of a substantial federal question, *Van Emmerick* v. *Janklow*, —— U.S. ——, 102 S.Ct. 986 (1982).*

Moreover, legislative alterations of procedural rules, even alterations modifying a remedy, have not been considered as violative of either Equal Protection or Due Process tenets. See *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933).

The Legislature's right to alter a rule of proof without running afoul of the Equal Protection Clause is undisputed, *Louisville and Nashville R.R.* v. *Melton*, 218 U.S. 36 (1910); *Mobile J. & K.C.R.R.* v. *Turnipseed*, 219 U.S. 34 (1910) (abrogation of fellow servant rule as to railroad employees). Nor is there an Equal Protection violation because of differences of treatment in local real property taxation between local districts in the state, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Board of Education, Levittown Union School Free District* v. *Nyquist*, —— N.Y.2d —— (Slip op. No. 317, June 23, 1982); nor for differentiation in procedural rules between different localities, *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879).

There is no due process violation in legislative limitation of a statutory remedy, *Crane* v. *Hahlo*, 258 U.S. 142 (1922) (limitation of judicial review of condemnation award to questions of jurisdiction, fraud and willful mis-

* If, as appellant asserts, the holding in *Matter of J.A. Green Construction Corp.* v. *Finance Administrator of the City of New York*, 56 N.Y.2d 369 (1982) creates an ambiguity with regard to the Court of Appeals' interpretation of the statute in question, this is all the more reason for dismissal of the instant appeal, *Minnick* v. *California Department of Corrections, supra; San Diego Gas & Electric Co.* v. *City of San Diego, supra.*

conduct of local officials). Compare *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957) (long arm statute did not violate due proces).

In short, the Court below properly held that there is no property right in the form of the remedy as long as some effective means of redress remains available, *Gibbs* v. *Zimmerman*, 290 U.S. 326 (1933), and that temporary out of pocket expense is not a proper basis for a due process challenge that access to the courts or a remedy has been denied. *Republic Natural Gas Co.* v. *Oklahoma, supra*, 334 U.S. 70-71; R.P.T.L. § 716.

Conclusion

Upon the foregoing, this appeal should be dismissed, or the judgment below affirmed.

Dated: New York, New York
October 18, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Appellee Pro Se

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JOHN M. FABRAR
Assistant Attorney General

Of Counsel

Office - Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS,
Attorney General of the State of New York,

Appellees.

On Appeal From the Court of Appeals of New York

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

Counsel of Record:
DAVID A. ROSS
DECHERT PRICE & RHOADS
Eleven Broadway
New York, NY 10004
(212) 425-3510
Attorney for Appellant
The Equitable Life Assurance Society of the United States

Of Counsel:
GALE G. MOSCOW
H. FRANCIS DELONE, JR.

October 22, 1982

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-6711

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPENING STATEMENT	1
JURISDICTION LIES IN THIS COURT	4
THE FEDERAL QUESTION IS SUBSTANTIAL	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Cited: Page

American Export Lines, Inc. v. Alvez, 446 U. S. 274 (1980) 5
Colt Industries, Inc. v. Finance Administtator of the City of New York, N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980) (A20-21), *aff'd*, 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981), *aff'd in part, mod. in part*, 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982) 2,7
Colt Industries, Inc. v. Finance Administrator of the City of New York, 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982) 5,7
Cox Broadcasting Corp. v. Cohn, 420 U. S. 469 (1975) 4, 5
Guaranty Trust Co. v. York, 326 U. S. 99, *reh'g denied*, 326 U. S. 806 (1945) 7
Ed Guth Realty, Inc. v. Gingold, 34 N. Y. 2d 440, 358 N. Y. S. 2d 367 (1974) 3
Mills v. Alabama, 384 U. S. 214 (1966) 5
People ex rel. Parklin Operating Corp. v. Miller, 287 N. Y. 126 (1941) 4
Pope v. Atlantic C. L. R. Co., 345 U. S. 379 (1953) 5
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 (1945) 5
Shapiro v. Thompson, 394 U. S. 618 (1969) 8
Slewett & Farber v. Board of Assessors, 54 N. Y. 2d 547, 446 N. Y. S. 2d 241 (1982) 4

Statutes Cited:

28 U. S. C. § 1257 4,5
Act of April 27, 1969, ch. 302, McKinney's 1969 New York Session Laws 399 2
Act of December 3, 1981, ch. 1057, § 7, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp. at 1981-233) 3,5
N. Y. Real Property Tax Law § 716 (McKinney 1972) 8,9

TABLE OF AUTHORITIES (Continued)

Miscellaneous: Page

Study for City Calls Realty Tax 'Hideously Inequitable', N. Y. Times, Apr. 24, 1981, § 1, at 1, col. 2 1

Real Property Tax Policy for New York City, "A study conducted under contract with the Department of Finance, City of New York, by Graduate School of Public Administration, New York Unviresity" December 31, 1980 at I-2 2

No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS,
Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

"Hideously inequitable" is the term a recent study, prepared by the Dean of New York University's Graduate School of Public Administration and commissioned by the City of New York, used to describe the real property assessment practices of New York City. *Study for City Calls Realty Tax 'Hideously Inequitable'*, N. Y. Times, Apr. 24, 1981, § 1, at 1, col. 2. Despite the inequity in

assessment practices of New York City, which "can fairly be described as a classification system with 830,000 classes —each parcel of real property is its own class—and the rate of tax for each class determined by neither the State Constitution, State law or the legislative bodies of the City of New York," there have been no real estate tax inequality challenges within the City for approximately eighty years. *Real Property Tax Policy for New York City,* "A study conducted under contract with the Department of Finance, City of New York, by Graduate School of Public Administration, New York University" December 31, 1980 at I-2. *See Colt Industries, Inc. v. Finance Administrator of the City of New York,* N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980) (A at 27),[1] *aff'd,* 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981), *aff'd in part, mod. in part,* 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982).

Appellee, Robert Abrams, Attorney General of the State of New York ("State"), correctly concludes that income-producing property owners, who previously failed to prosecute their tax certiorari petitions, began to notice the proceedings for trial on the basis of inequality of assessment when it became apparent that an effective remedy to redress such inequality was available. S. M. at 5.[2] The perceived effective remedy derived from a State legislative enactment and a decision of the Court of Appeals of New York. First, in 1969, the Legislature amended New York Real Property Tax Law § 720(3), Act of April 27, 1969, ch. 302, McKinney's 1969 New York Session Laws 399, and permitted exclusive reliance upon the State Equalization Rate in real property tax proceedings predi-

1. Appendix references are to the appendix to the Jurisdictional Statement and are designated "A".

2. The Motion to Dismiss or Affirm of the State is designated "S. M."; the Motion to Dismiss or Affirm of the Finance Administration and the Tax Commission of the City of New York ("City") is designated "C. M.".

cated upon a claimed inequality of assessment. The State Equalization Rate measures the aggregate ratio of assessed values-to-fair market values within an assessing unit. Next, the Court of Appeals, in *Ed Guth Realty, Inc. v. Gingold*, 34 N. Y. 2d 440, 447-450, 358 N. Y. S. 2d 367, 371-373 (1974), held that the State Equalization Rate is the most objective evidence of inequality of assessment, is arrived at expertly, and as such is competent evidence in real estate tax proceedings. (S. M. at 4-5).

The statute challenged herein, Act of December 3, 1981, ch. 1057, § 7, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp. at 1981-233) ("L. 1981, ch. 1057, § 7"), which deprives City real property taxpayers of the right to rely on the State Equalization Rate to establish violations of the right to uniform and equal assessment practices, effectively restores to New York City the historic freedom from challenge of its unequal assessment practices.

The State and the City of New York urge that this Court lacks jurisdiction to disturb the City's freedom from challenge to its unequal assessment practices. This brief demonstrates that their arguments are without merit.

JURISDICTION LIES IN THIS COURT

The decision of the New York Court of Appeals is a final judgment or decree within the scope of 28 U. S. C. § 1257. A tax review proceeding predicated upon a claim of inequality of assessment is a bifurcated proceeding in which there is an initial trial of the issue of the aggregate ratio of assessed values-to-fair market values within the assessing unit. The second aspect of the proceeding is a trial of the fair market value of the property whose specific tax assessment is challenged. The ratio established in the initial trial is applied to the value determined in the second stage. *Slewett & Farber v. Board of Assessors, Nassau County*, 54 N. Y. 2d 547, 555, 446 N. Y. S. 2d 241, 243 (1982); S. M. at 3; C. M. at 3. The decision of the Court of Appeals on the federal issue presented herein pre-ordains the outcome of further proceedings: Appellant, the Equitable Life Assurance Society of the United States ("Equitable"), is precluded from using the State Equalization Rate to establish the aggregate ratio of assessed values-to-fair market values in the City; the cost of the sales and selected parcels methods of proof precludes Equitable from using either, or both, of these methods to establish the *de facto* standard of assessment within the City; no other remedy is statutorily available. J. S. at 12-14.[3] Were Equitable to proceed solely with the valuation issue, the trial court would be required to apply the *de jure* full value assessment standard, not the *de facto* standard sought by Equitable. *See People ex rel. Parklin Operating Corp. v. Miller*, 287 N. Y. 126, 128-29 (1941). Thus, the issue of whether Equitable's property has been assessed at a greater percentage of full value than that percentage generally prevailing in the City effectively cannot be addressed. The outcome of the case is pre-ordained. The federal question presented herein and at each judicial level is the controlling question. There is no additional remaining federal question; nor will there be. In these circumstances, jurisdiction lies in this Court. *Cox Broad-*

3. The Jurisdictional Statement is designated "J. S.".

casting Corp. v. Cohn, 420 U. S. 469, 479 (1975); *Pope v. Atlantic C. L. R. Co.*, 345 U. S. 379, 381-383 (1953); *Mills v. Alabama*, 384 U. S. 214, 217-218 (1966).

Appellees urge that the decision of the Court of Appeals pertains solely to the facial validity of L. 1981, ch. 1057, § 7 and not to the constitutionality of the statute as applied. S. M. at 12; C. M. at 8. The Court of Appeals, however, unequivocally stated: "[W]e hold this section of the Real Property Tax Law [L. 1981, ch. 1057, § 7], as enacted on December 3, 1981, to be constitutional." *Colt Industries, Inc. v. Finance Administration of the City of New York*, 54 N. Y. 2d 533, 544, 446 N. Y. S. 2d 237, 240 (1982) (A at 6). Moreover, Appellees have drawn a distinction without a difference. It is clear that a lower court, being required to follow the mandates of the Court of Appeals, will apply the statute so as to deny Equitable use of the State Equalization Rate to establish the inequality of its real property assessments.

Secondly, even were Equitable to proceed with the valuation trial, the issue of whether its assessments are unequal *vis-à-vis* that of all other property in the City effectively cannot be determined in light of the decision of the Court of Appeals that Equitable is precluded from relying upon the State Equalization Rate. The only issue which would be reviewable in further State proceedings is the correctness of the valuation decision—an issue which hardly presents a federal question. Therefore, the situation presented herein also falls within the second category of cases enunciated in *Cox Broadcasting Corp. v. Cohn*, *supra*, 384 U. S. at 480, "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *See American Export Lines, Inc. v. Alvez*, 446 U. S. 274, 279 (1980); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 123-27 (1945).

For the foregoing reasons, the decision of the Court of Appeals on the federal issue should be deemed a final judgment for the purposes of 28 U. S. C. § 1257. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U. S. at 477.

THE FEDERAL QUESTION IS SUBSTANTIAL

In their attempt to defeat Equitable's position that this Court should note probable jurisdiction of this appeal, Appellees incorrectly assert: 1) that the decision of the Court of Appeals relates to a procedural issue which is a matter of state and local concern; 2) that Equitable may establish the aggregate ratio of assessed values-to-market values by use of sales and selected parcels methods of proof; and 3) that, in any event, Equitable can be compensated for the costs of proving the aggregate ratio. S. M. at 15, 12, 13; C. M. at 7, 9, 8.

As evidenced by the Record (Haims Affidavit; A at 48-49), use of the sales and selected parcels methods of proving the *de facto* standard of assessment for just one of the geographic sections in New York City would cost approximately $3,000,000.[4] By extrapolation, it is easy to see that the cost of establishing the *de facto* standard of assessment for the entire City of New York by use of these methods would be astronomical. In contrast to the overwhelming costs of proving the City-wide *de facto* standard of assessment, Equitable's potential recovery is small. For example, with respect to the property located at 645 Madison Avenue, Equitable's maximum potential recovery is $2,721,900.[5]

---

4. Manhattan has 8 such sections; the other four boroughs in New York City comprise approximately 90 such sections.

5. This figure is derived from the claimed values, claimed equalization rates and actual assessments which appear in each petition and were part of the Record in the Court of Appeals. The sum is the result of the following processes: (1) the claimed fair market value of the property is multiplied by the claimed equalization rate for each tax year at issue, (2) the products, which represent the equalized claimed values, are subtracted from the corresponding actual annual assessments, (3) the difference for each tax year is multiplied by the appropriate actual tax rate.

The maximum potential recovery with respect to the property located at 717 Fifth Avenue, as calculated from figures appearing in the Record, is $3,540,985.

The Court of Appeals in this case held that Equitable has the right to proceed on a whole-roll basis of comparison.[6] Given the fact that under New York law a taxpayer has the legal right to have its property assessed at the prevailing City-wide rate and given the astronomical costs of proving such rate in New York City by use of the sales and selected parcels methods, the Appellees' assertion that the decision of the Court of Appeals concerns only a "procedural" matter is meaningless. The effect of the decision is substantial, regardless of the characterization applied to its subject matter.

Moreover, Equitable has established that denial of the use of the State Equalization Rate in challenges to real property assessments predicated upon claimed inequality of assessment is outcome-determinative and, therefore, substantive. *See Guaranty Trust Co. v. York*, 326 U. S. 99, 109, *reh'g denied*, 326 U. S. 806 (1945). If, as asserted by the City and State, such a denial is merely procedural in nature and the sales and selected parcels methods of proof do provide real remedies, why has no City taxpayer proceeded with an inequality of assessment challenge for the past eighty years? Whatever appellation is attributed to the denial of the use of the State Equalization Rate, its constitutional impact cannot be denied.

The cases cited by both the City and the State for the proposition that the sales and selected parcels methods of

6. Equitable at every step of the proceedings has asserted its right to have its assessments reviewed on a whole-roll basis, *i.e.*, a City-wide basis. The cost estimate in the Haims Affidavit, however, was prepared in accordance with the ruling of the trial court in *Colt Industries, Inc. v. Finance Administration of the City of New York*, *supra*, that a valid classification system of assessment exists in New York City and that an inequality challenge in the City may proceed only on the basis of a comparison of the challenged assessment with that of comparable (like-kind) properties within a section of the City. The Court of Appeals rejected the lower court's conclusion in *Colt Industries, Inc.*, *supra*, when it considered this issue on appeal. 54 N. Y. 2d at 541, 446 N. Y. S. 2d at 238 (A at 2).

proof are real, not illusory, remedies are inapposite to the situation faced by New York City taxpayers. Each and every cited case involved properties in assessing units outside the City, where the costs of proving inequality of assessment by these methods would be substantially less. *See* S. M. at 12-13; C. M. at 8-9.

Finally, the State and Nassau County (as *Amicus Curiae*) have themselves implicitly admitted that the challenged statute is substantive. While asserting that the challenged statute is only procedural, the State itself has defeated this assertion by claiming: "[T]he automatic application of the state rate, once litigated, threatened units such as Nassau County and the City of New York (if the R. P. T. L. was applicable) with sudden exposure to the refund of billions of dollars in real property tax refunds [footnote omitted] . . . ." S. M. at 5.[7] The State's theme is echoed by the County of Nassau which indicates, at page 2 of its *Amicus Curiae* brief, that the County Executive directed sponsorship of the brief "[i]nasmuch as the evidentiary ratio issue can and will substantially affect the Treasury and Assessment Roll of the County of Nassau . . . ." These statements are implicit admissions not only of a widespread inequity in the system of real property tax assessments in these areas but also of the inability of taxpayers to present an effective challenge to that inequitable system by use of the sales and selected parcels methods. Legislation to insulate municipalities from purported financial harm or the consequences of illegal acts cannot be sustained, particularly when weighed against individual constitutional guarantees. *See Shapiro v. Thompson*, 394 U. S. 618, 633 (1969).

The fact that there is a statutory provision for the recovery of expenses in certain limited circumstances does not make remedial that which otherwise is a non-remedy. Section 716 of the New York Real Property Tax Law pro-

7. The State observes that "[i]n the City of New Yor' this exposure was reported at 1.7 to 2.7 billion dollars." S. M. at 5 (f.n.).

vides that recovery of expenses is possible only in those situations where, upon the refusal of an assessing unit to admit to a demanded ratio, the taxpayer "proves that the percentage of full value at which other real property in the assessing unit is assessed *is not in excess of the percentage specified in his demand* . . . ." (emphasis added).[8] Moreover, the court, upon application for recovery of expenses, need not order reimbursement if it finds that the assessing unit had good and sufficient reason for its failure to admit the ratio of assessment. *Id.* Thus, this statutory provision hardly is a guarantee of cost recoupment; nor is it an incentive to a taxpayer to spend millions of dollars

8. The full text of this section provides:

§ 716. Admission of percentage of full value at which real property is assessed.

1. Except in a proceeding to review a special franchise assessment, at any time after answer has been served or has been deemed made and not later than twenty days before the trial, the petitioner may serve upon the respondent a demand for admission for the purposes of such proceeding that the percentage of full value at which other real property is assessed in the unit is a percentage specified in such demand, but not in excess of ninety-five per centum. Unless the respondent within fifteen days after service of such demand, or within such further time as the court may allow on motion on notice, serves and files a notice specifically denying that the percentage specified in such demand is correct, such percentage shall be deemed admitted.

2. After being served with such demand if the respondent serves such a notice of denial, and the petitioner thereafter proves that the percentage of full value at which other real property is assessed in the assessing unit is not in excess of the percentage specified in his demand, he may apply to the court at or immediately following the trial for an order requiring the respondent to pay him the reasonable expenses incurred in making such proof including the reasonable fees of experts and attorneys. Unless the court finds that there was good and sufficient reason for the respondent's denial, the order shall be made irrespective of the results of the proceeding.

up-front inasmuch as he could find himself in the position of demanding admission of a fifty percent ratio and, upon denial of such demand, establishing a fifty-one percent ratio. In such an event, the taxpayer could not apply to recover the costs-of-proof even though he had substantially prevailed on his claims.

Thus, the decision of the Court of Appeals, precluding use of the State Equalization Rate to establish the violation of the right of a New York City real property taxpayer to equality of assessment, effectively denies challenge of unequal assessments. The federal question is substantial.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

David A. Ross
Member of the Bar of the
United States Supreme Court
Dechert Price & Rhoads
Eleven Broadway
New York, N. Y. 10004

Counsel of Record for Appellant
The Equitable Life Assurance
Society of the United States

Of Counsel:

Gale G. Moscow
H. Francis DeLone, Jr.

Dated: October 22, 1982

Office - Supreme
FILE
OCT 19 1982
ALEXANDER
CLERK

Docket No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK and ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Brief of the County of Nassau as *Amicus Curiae*

EDWARD G. McCABE
County Attorney of Nassau County
Attorney for the County of Nassau as Amicus Curiae
Nassau County Executive Building, 1 West Street
Mineola, NY 11501
(516) 535-2990

ANDREW G. CANGEMI, Deputy County Attorney
MICHAEL L. CHARTAN, Deputy County Attorney
Of Counsel

Question Presented.

May a legislature amend an evidentiary statute, utilized specifically for real property tax review proceedings, by excising a previously permissible evidentiary tool in "special assessing" units within the state without denying a taxpayer in such district Equal Protection or Due Process rights guaranteed by the Fourteenth Amendment of the Constitution of the United States?

Table of Contents.

	Page
Question Presented	i
Table of Authorities	ii
Interest of Nassau County	1
Summary of Argument	2
The Question is not Substantial	3
A. Introduction	3
B. The Due Process question	4
C. The Equal Protection question	10
Conclusion	16

TABLE OF AUTHORITIES.

CASES CITED:

A. Backus, Jr., & Sons v. Fort Street Union Depot Co., 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853 (1897)	5
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971)	6
Bowman v. Lewis, 101 U.S. 22, 25 L. Ed. 989 (1880)	12

Page

Brinkerhoff-Faris Trust & Savings Co. v. Walter O. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 14

Canigiani v. Board of Assessors of Nassau County, N.Y.L.J., July 29, 1981, at 13, col. 2 (Sup. Ct. Nassau Co., June 29, 1981) 9

Colt Industries v. Finance Administrator, 54 N.Y.2d 533, 446 N.Y.S. 2d 237 (1982) 4, 13

County of Nassau v. State Board of Equalization and Assessment, 80 A.D. 2d 9, 437 N.Y.S. 2d 793 (3d. Dept. 1981) 9

County of Nassau v. State Board of Equalization & Assessment, Supreme Court, Albany County, Index No. 1920/82 9

Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 87 S.Ct. 1746 18 L.Ed. 2d 954 (1967) ... 8

Ed Guth Realty, Inc. v. Gingold, 41 A.D. 2d 479, 344 N.Y.S. 2d 270 (4th Dept. 1973), aff'd 34 N.Y.2d 440, 358 N.Y.S. 2d 367 (1974) 4, 7, 14

860 Executive Towers v. Board of Assessors of the County of Nassau, 84 Misc. 2d 12, 374 N.Y.S. 2d 284, aff'd 53 A.D.2d 463, 385 N.Y.S. 2d 604 (2d Dept. 1976) aff'd *sub nom* Pierre Pellaton Apts., Inc. v. Board of Assessors, 43 N.Y. 2d 769, 40, N.Y.S.2d 1013 (1977) 7

Page

Ex parte Joseph Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949) 8

Gibbes v. Zimmerman, 290 U.S. 326, 54, S.Ct. 140, 78 L.Ed. 342 (1933) 5

Hardware Dealers Mutual Fire Insurance Co., v. Glidden Co., 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931) 5

Hillsborough Township v. Cromwell, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946) 15

Israel v. Wood Dolson Co., Inc., 1 N.Y.2d 116, 151 N.Y.S. 2d 1 (1956) 8

J. A. Green v. Finance Administrator of the City of New York, 56 N.Y.2d 363 (1982) 13, 14

Matter of O'Brien v. Assessors, 20 N.Y. 2d 587, 285 N.Y.S. 2d 843 (1967) 3, 11

Pritchard v. Norton, 106 U.S. 124, 1 S.Ct. 102, 27 L.Ed. 104 (1882) 5

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212 (1947) 8

Salsburg v. Maryland, 346 U.S. 545, 74 S.Ct. 280, 98 L. Ed. 281 (1954) 13

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973) 13

Page

Simonson v. International Bank, 14 N.Y.2d 281 (1964) 13

Sioux City Bridge Co. v. Dakota, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923)..... 15

Slewett & Farber v. Board of Assessors, 54 N.Y. 2d 547, 446 N.Y.S. 2d 241 (1982)..... 3, 10

Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 78 L.Ed. 674 (1934)..... 6

Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 38 S.Ct. 495, 62 L.Ed. 1154 (1918)..... 15

Yarras v. Kinnaw, 303 N.Y. 224, (1951)..... 11

Wolf v. Assessor, 308 N.Y. 416, (1955) 11

STATUTES CITED:

28 U.S.C. Sec. 1391 (West) 8

28 U.S.C. Sec. 1404 (West) 8

N.Y. Sess. Laws, 1961, ch. 942 ..... 2, 3, 11

N.Y. Sess. Laws, 1969, ch. 302 ..... 4, 11

N.Y. Sess. Laws, 1979, ch. 126 ..... 4, 11

N.Y. Sess. Laws, 1981, ch. 1057 ..... 4, 10, 11, 16

Page

New York Real Property Tax Law Sec. 716 (McKinney) 7

New York Real Property Tax Law Sec. 720 (McKinney) 7, 10

MISCELLANEOUS:

4 N.Y. Jurisprudence 2d Sec. 400, p. 501, (Lawyer's Cooperative Pub. Co.) 13

DOCKET NO. 82-290

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION and THE TAX COMMISSION OF THE CITY OF NEW YORK, and ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

Brief of the County of Nassau as *Amicus Curiae.*

Interest of Nassau County.

Issues of vital concern to Nassau County, New York, are raised in the instant proceeding. As described in Appellant's Jurisdictional Statement (pp. 2, 3) the challenged

Real Property State Statute (L. 1981, ch. 1057, §7) excises a previously permitted evidentiary ratio tool in those "special" assessing units defined in the statute (§1801, ch. 1057). To date, only the City of New York and the County of Nassau qualify as "special" assessing units under the statute (see Appellant's Jurisdictional Statement, p. 3).

Inasmuch as the evidentiary ratio issue can and will substantially affect the Treasury and Assessment Roll of the County of Nassau, the County Executive in the interest of fair and effective representation for the County's 1,300,000 residents, has directed the County Attorney to sponsor this brief in the instant matter on behalf of the residents of the County of Nassau under Rule 36(4) of this Court.

Summary of Argument.

It is the position of Nassau County that the sound legal and constitutional principles enunciated in *Colt Industries* and *Equitable Life* effectively put to rest any claim to federal constitutional infringement.

Similarly, no litigant has a vested right to a particular evidentiary tool. It is within the particular purview of the state legislature to pass on evidentiary issues of this type. Indeed, all the legislature has done in this instance is to reinstate previously constitutional evidentiary methods of proving ratio for review of tax assessments (N.Y. Sess. Law, ch. 942, L. 1961, Former Tax Law §293). Due process violations are not premised on the fact that a legislature has excised the more convenient evidentiary tool from procedural evidentiary statutes.

Statutory differentiations based upon population density, numbers of real estate parcels within assessing units

and other factors are relevant criteria to be considered when drafting legislation affecting various and distinguishable municipalities within the state.

No equal protection argument will lie when there are coherent and suitable (i.e., rational) reasons for a state to make such regional distinctions in taxing matters.

The Question is Not Substantial.

A. Introduction.

Ratio is an integral and necessary burden of proof petitioners must meet in order to prove their claim of overassessment by reason of inequality. An allegedly aggrieved taxpayer must first establish the applicable ratio of assessment to full value within the appropriate assessing unit. Next, he must prove the market value of his property. This value is then applied to the proven ratio to determine whether or not an overassessment exists. *Matter of Slewett & Farber v. Board of Assessors of the County of Nassau,* 54 NY 2d 547, 555, 446 N.Y.S. 2d 241 (1982).

Prior to 1961, proof of ratio was only permitted based upon the traditional sample parcel or actual sales methods (former Tax Law §293; see also *Matter of O'Brien v. Assessors,* 20 NY 2d 587, 595, 285 N.Y.S. 2d 243 [1967]). In 1961 the New York State Legislature permitted the use of the equalization rate established by the State Board of Equalization and Assessment (state rate), for the particular assessing unit, as some evidence of ratio. N.Y. Sess. Laws, L. 1961, ch. 942. However, petitioners could not *exclusively* rely on the state rates to prove ratio (*O'Brien, supra*). Subsequently, the Legislature amended the appropriate evidentiary statute to permit the use of the

state rates as the exclusive proof of ratio in an inequality proceeding (N.Y. Sess. Laws, 1969, ch. 302; *Ed Guth Realty, Inc. v. Gingold,* 34 NY 2d 440, 358 N.Y.S. 2d 367 [1974]).

The Legislature, because of the financial impact these state rates were having in many municipalities across the state, soured about the use of this evidentiary tool and beginning in 1979 attempted to excise the use of the state equalization rate as proof of ratio across the state. See N.Y. Sess. Laws, 1979, ch. 126. In 1981, the use of the state rates in "special" assessing units was eliminated. N.Y. Sess. Laws, 1981, ch. 1057.

The Court of Appeals of the State of New York, did not find any constitutional due process or equal protection infirmities concerning L. 1981, ch. 1057. *Colt Industries v. Finance Administrator,* 54 N.Y. 2d 533, 446 N.Y.S. 2d 237 (1982).

As a result, the within appeal ensued.

B. The Due Process question.

Appellant submits that the decision by the New York State Legislature to proscribe the use of state equalization rates as evidence and proof of inequality in Special Assessing Units works a denial of Equal Protection and Due Process as provided for in the Fourteenth Amendment. It is submitted that the change in a procedural rule of evidence does not work a denial of Equal Protection and Due Process to the Appellant. Further, the question presented by the Appellant is not a substantial federal question inasmuch as this Court has on prior occasions answered the question raised. Therefore, the appeal

should be dismissed for want of a substantial federal question and the judgment of the New York Court of Appeals affirmed.

It has long been recognized that due process will protect a vested cause of action from arbitrary interference *Pritchard v. Norton,* 106 U.S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104, 107 (1882). However,

> the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa C. R. Co. v. Iowa,* 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 S. Ct. 344; *A. Backus Jr. & Sons v. Fort Street Union Depot Co.,* 169 U. S. 557, 571, 42 L. ed. 853, 859, 18 S. Ct. 445; *Crane v. Hahlo,* 258 U. S. 142, 147, 66 L. ed. 514, 517, 42 S. Ct. 214; *Hardware Dealers Mut. F. Ins. Co. v. Glidden Co.,* 284 U. S. 151, 158, 76 L. ed. 214, 219, 52 S. Ct. 69.

Gibbes v. Zimmerman, 290 U. S. 326, 332, 54 S. Ct. 140, 78 L. Ed. 342, 347 (1933).

Moreover, state legislatures are permitted to change rules of procedure that have existed in the past and enact entirely new modes of procedure. *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.,* 169 U. S. 557, 571, 18 S. Ct. 445, 42 L. Ed. 853, 859-60 (1897). As the Court in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.,* 284 U. S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931), recognized,

> . . .[t]he 14th Amendment . . . [does not] guarantee any particular form or method of state procedure.

> See *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384. In the exercise of that power and to satisfy a public need [the procedure by which rights may be enforced and wrongs remedied], a state may choose the remedy best adapted, in the legislative judgment to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

284 U. S., at 158, 76 L. Ed., at 219.

Thus, a state is free to regulate its procedure for enforcing rights and remedying wrongs. A state may change a procedural rule of evidence if an effective procedure is maintained. That another method may seem fairer or wiser or provide greater protection will not cause a procedure to run foul of the Fourteenth Amendment. *Snyder v. Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674, 677 (1934).

The New York Legislature has preserved Appellant's right to petition for a review of its real property assessment through filing of a *certiorari* proceeding pursuant to Article Seven of the New York Real Property Tax Law (hereinafter cited as N.Y. RPTL). Thus, the situation of abolishing an existing cause of action is not before this Court. Nor is the Appellant denied access to the court in the first instance. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

The legislature has seen fit, however, to change a procedural rule of evidence in *certiorari* proceedings. Petitioners who seek review of their real property assessments

must prove inequality through use of the parcel selection method, the actual sales method or the State equalization rates. However, petitioners in Special Assessing Units (presently only New York City and Nassau County are such units) are not permitted to prove inequality by using the State equalization rates. N. Y. RPTL §720(3) (McKinney's). Therefore, Appellant may use the parcel selection method or actual sales method to prove inequality inasmuch as its property is located in New York City. It is alleged by Appellant that this procedure denies Due Process inasmuch as it is not effective.

Appellant goes to great length to point out the cost of using the parcel selection method or the actual sales method. Jurisdictional Statement of Appellant, pgs. 11-15. Yet, Appellant has failed to point out that petitioners can be reimbursed for the costs of proving inequality. N. Y. RPTL §716 (McKinney's). This is so as long as petitioner proves a ratio of inequality, i.e., percentage of full value at which property is assessed in the assessing unit, not in excess of the ratio specified in his demand. N. Y. RPTL §716(2) (McKinney's). The costs paid by the assessing unit include the fees of experts and attorneys. *Id.*

Indeed, the petitioner in *860 Executive Towers v. Board of Assessors of the County of Nassau,* 84 Misc. 2d 12, 374 N.Y.S. 2d 284, aff'd 53 A. D. 2d 463, 385 N.Y.S. 2d 604 (2d Dept. 1976), aff'd *sub nom. Pierre Pellaton Apts., Inc. v. Board of Assessors,* 43 N.Y. 2d 769, 401 N.Y.S. 2d 1013 (1977), did receive their costs for proving inequality, as did the petitioner in *Ed Guth Realty, Inc. v. Gingold,* 41 A. D. 2d 479, 344 N.Y.S. 2d 270 (4th Dept. 1973), aff'd 34 N.Y. 2d 440, 358 N.Y.S. 2d 367 (1974). Thus, petitioners in addition to being provided with access to the

courts for review of their assessments, are provided with a means to be reimbused for their costs once their evidentiary burden is met and proven. It strains credibility for Appellant to maintain that the procedure provided for by the legislature is not effective where the taxing authority will ultimately pay the costs of litigation.

Additionally, cost of litigation and temporary out of pocket expenses are not basis for Supreme Court review prior to final state determination. *Republic National Gas. v. Oklahoma,* 334 U.S. at p. 62 (1947).

The situation presented to this Court is not unlike that presented by change of venue in the federal courts. Initially, the plaintiff selects the place of suit. 28 U.S.C. §1391 (West). A motion for change of venue, of course, may then be filed. 28 U.S.C. §1404 (West). If said motion is granted, it is quite possible that one of the parties to the suit may experience inconvenience and greater expense to maintain suit. Yet, this Court has consistently held that this rule of procedure, even though it may cause greater expense, does not work a denial of due process. See *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen,* 387 U.S. 556, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967); *Ex parte Joseph Collett,* 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949).

In the case at bar, the legislature of the State of New York provided that costs be paid alleviating much of the inconvenience faced by Appellant. It must be noted that Appellant herein has not alleged that it is incapable of proving ratio under the present conditions. Once Appellant establishes ratio other petitioners may, if they choose to do so, collaterally estop the assessing unit from challenging the rate. *Ed Guth Realty v. Gingold, supra;* see, *Israel*

v. Wood Dolson Co., Inc., 1 N.Y. 2d 116, 151 N.Y.S. 2d 1 (1956). It is clear that the law proceeds in an orderly fashion and provides due process to the Appellant and other petitioners who seek review of their real property assessments.

The decisional law of New York also makes clear that the State equalization rates for Nassau County have not been always been expertly arrived at. Nassau County has succeeded in challenging these rates and having them annulled. See, *County of Nassau v. State Board of Equalization & Assessment*, 80 A. D. 2d 9, 437 N.Y.S. 2d 793 (3d Dept. 1981). The County of Nassau is currently challenging the 1980 equalization rate as established for Nassau County. *County of Nassau v. State Board of Equalization & Assessment*, Supreme Court, Albany County, Index No. 1920/82. Thus, it is not unreasonable nor arbitrary for the legislature to decide that the State equalization rates for Nassau County do not provide the evidence best adapted to protect the interests of aggrieved taxpayers and the municipality.

Canigiani v. Board of Assessors of Nassau County, N.Y.L.J., July 9, 1981, at 13, col. 2 (Sup.Ct.Nassau Co., June 29, 1981), has little application to the case at bar (Jurisdictional Statement p.13). It should be pointed out to this Court that the County of Nassau therein refused to put on a direct case in light of the way that proceeding was commenced and considers the case procedurally and substantially defective.

The court therein refused to let this declaratory action take its normal procedural course. The County of Nassau was permitted no discovery, no pre-trial disclosure, no opportunity to attack the accuracy of the state rate (even

though some of those rates had already been annulled by orders of other courts, see p. 15 herein) and little opportunity even to prepare its own witnesses or brief relevant points of law. It goes without saying this matter is now under appeal and in light of the Court of Appeals holding in *Colt* on cost it is unlikely to withstand appellate scrutiny.

It should also be noted that at the time of this proceeding, an appellate court had already passed on the constitutionality of the law in question. *Slewett & Farber v. Board of Assessors*, 80 AD 2d 186, 438 NYS 2d 544 (1981).

This appeal does not present a substantial federal due process question. Prior case law holds that procedural rules may be changed by a state legislature. In this case, New York has changed a rule of procedure. The change must preserve the substantial right to redress by some effective procedure. In New York, Appellant may still prove inequality and can be paid the costs involved therein. Moreover, the ratio once determined under the new enactment may be used by other litigants as evidence of inequality via collateral estoppel in those years where the rates have been established pursuant to the new enactment. Finally, the history of litigation on the promulgation of State equalization rates for Nassau County and the State Board methodology as it affects Nassau County indicates that the legislature was reasonable and not arbitrary when it banned the use of these state rates in certain parts of the State.

C. The Equal Protection question.

The County of Nassau respectfully submits that the legislative plan in issue (RPTL Sec. 720[3]; L1981 ch 1057) which establishes a different evidentiary standard for

Nassau County and New York City from the rest of the state with respect to proving inequality does not violate the Equal Protection provisions of the Fourteenth Amendment.

It is axiomatic that the statute in question is evidentiary and is therefore remedial and procedural in nature. See *Yarras v. Kinnan,* 303 NY 224 (1951); *Wolf v. Assessor,* 308 NY 416 (1955); *O'Brien, supra.* The Legislature is, of course, empowered to change policy by suspending or modifying statutes of this type thereby changing prior statute or case law. Indeed, it is undisputed that the legislature has, in the past, modified this evidentiary statute to conform to their changing policy (see generally former Tax Law Sec. 293; N.Y. Sess.Laws 1961, ch 942; N.Y.Sess.Laws 1969, ch 302; N.Y.Sess. Laws 1979, ch 126; N.Y.Sess. Laws 1981, ch 1057).

Appellant does not seem to challenge this general proposition. Rather, appellant contends that the present enactment is repugnant to the equal protection and due process guarantees of the 14th Amendment. Such contention is specious.

This Court has historically held that regional distinctions made within a state are constitutionally permissible if founded on a rational basis. As long ago as 1880, this Court has held:

> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method

of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." *Bowman v. Lewis,* 101 U.S. 22, 31,25 L.Ed. 989 (1880).

It should be noted that in 1880 the surrounding counties of New York City included the City of Brooklyn and Queens County which then included what is now Nassau.

The state's power to draw reasonable distinctions between political subdivisions within its borders has never been questioned, *Salsburg v. Maryland,* 346 US 545, 551-552 74 S.Ct. 280, 98 L.Ed. 281 (1954); *San Antonio Independent School District v. Rodriguez,* 411 US 1, 28 93 S.Ct. 1278, 36 L.Ed. 16,39-40 (1973). Appellants seem to suggest that the only distinction outlined within the new law, is one based solely upon population (see Jurisdictional Statement p. 18). Such is not the case. As the Court of Appeals of New York has pointed out, a rational basis for the distinction was not based upon both population density *and* diversity of property. *Colt Industries, supra,* 54 NY 2d, at 545. Other factors that would support the rational basis for the distinction are that Nassau County and New York City are one assessment jurisdiction as opposed from the rest of the state (except Tompkins County) and the huge number of parcels (approximately 400,000 in Nassau County and 700,000 in New York City) demand different treatment in these jurisdictions as opposed to the rest of the state.

Appellants place critical reliance on a quote from the Court of Appeals of New York in *J. A. Green v. Finance Administrator of the City of New York,* 56 NY 2d 363, 376 (1982) which purportedly gave substantive effect to a procedural statute (Jurisdictional Statement p. 18). A careful analysis of said quote and the authorities relied on by the Court of Appeals (*Simonson v. International Bank,* 14 NY2d 281, 289, 290 [1964]; 4 NY Jur 2d 501 Sec. 400), indicates the little relevance said quote has to this appeal.

Normally an appeal will be determined in accordance with the law at the time of an appellate review, 4 NY Jur.2d 501 Sec. 400. However, it will take a clear legislative mandate to apply new legislative enactments to

actions wherein the relevant proceeding has since past, *Simonson, supra,* 14 NY 2d, at 289, 290. The present evidentiary statute contains no language that would permit the court to apply it to cases where an evidentiary hearing has already taken place.

In *J. A. Green,* a hearing permitting the use of the state rates had occurred prior to the enactment of the new statute, see *J. A. Greene v. Finance Administrator,* NOR index No. 12468/71 Ventiara R. Kings Co., dec'd November 20, 1980. Without a clear legislative mandate to the contrary, it was absolutely permissible for the Court of Appeals to let stand the evidentiary holding in *J.A. Green* based on the hearing which took place prior to the new enactment. The "usual rule" of appellate review could not have applied in *J. A. Green* under the present evidentiary procedural statute.

Conversely, no evidentiary hearing had taken place in the case at bar. The Court of Appeals rationale in *J. A. Green* has no application, therefore, to the instant proceeding. In any event, the applicability and retroactivity of state evidentiary statutes are solely state matters not reviewable by federal courts. *Brinkerhoff-Faris Trust & Savings v. Walter O. Hill,* 281 US 673 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

Appellants also place great reliance on the accuracy of the State Equalization Rate as evidence of ratio in a tax review proceeding placing it on an almost sacrosanct level. (Jurisdictional Statement p.15). While it is true that in years past the courts of this state have approved the use of this rate as evidence of ratio in real property tax review proceedings, *Guth Realty Inc. v. Gingold,* 314 NY2d, at 449-50, it is also true that the courts of this state have been recently rejecting the accuracy of these rates and have

voided these rates as they have been promulgated for Nassau County for the past several years, *County of Nassau v. State Board of Equalization & Assessment*, Appellate Division, Third Dept., #37299, 1981 (1977 state rate); *County of Nassau v. SBEA*, Sup. Ct. Albany Co. Index No. 2447/80, 1981 (1978 state rate); *County of Nassau v. SBEA*, Sup. Ct. Albany Co. Index No. 1700/81, 1981 (1979 state rate); *County of Nassau v. SBEA*, Sup Ct. Albany Co, Pitt, J., dec'd Nov. 24, 1981 (1977 reinstituted rate).

Under these circumstances it is specious to suggest that the State Equalization Rate is "the only viable evidence" to prove ratio (Jurisdictional Statement p.19).

Additionally, those cases relied on by Appellant are inapplicable to the case at bar. It is uncontroverted herein that the Appellate courts of the State of New York will, by right, review assessments and determinations made below, unlike the situation in *Hillsborough Township v. Cromwell*, 326 US620, 625, 626, 66 S.Ct. 445, 90 L.Ed. 358 (1945). In this regard, there is no doubt as to the effectiveness of the state remedy in the case at bar.

Similarly, the particular issue of unequal assessments raised in *Sioux City Bridge Co. v. Dakota*, 260 US441, 43 S.Ct. 190, 67 L.Ed. 340 (1922), and the unique remedy afforded to aggrieved taxpayers therein by the state (raising other assessments rather than lowering the incorrect assessment to reach equality) is not before this Court and has little relevance to the case at bar.

Nor is there a claim of "intentional systematic undervaluation" of property "in the same class" as the property in question *Sunday Lake Iron Co. v. Wakefield*, 247 US 350, 38 S.Ct. 495, 62 L. Ed. 1154 (1918).

The holdings of this Court are clear and unambiguous. A rational basis exists to constitutionally justify the actions of the Legislature in enacting the law in question (L.1981 ch 1057, RPTL 730[3]). There is no constitutional infirmity in enacting such legislation.

Conclusion.

For all the foregoing, it is respectfully submitted that this Court dismiss this appeal for want of a substantial federal question and affirm the judgment of the New York Court of Appeals below.

Respectfully submitted,

EDWARD G. McCABE
Member of the Bar of the United
States Supreme Court
County Attorney of Nassau County
1 West Street
Mineola, NY 11501
Counsel for Amicus Curiae Appellee
County of Nassau

Of Counsel
ANDREW G. CANGEMI
MICHAEL L. CHARTAN